No. 04-814
Vide 04-805

Title:	Shell Oil Company, Petitioner v. Fouad N. Dagher, et al.
Docketed:	December 17, 2004
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(02-56509)
Decision Date:	June 1, 2004
Rehearing Denied:	September 15, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Dec 14 2004	Petition for a writ of certiorari filed. (Response due January 18, 2005)
Jan 7 2005	Brief of respondents Fouad N. Dagher, et al. in opposition filed. VIDED.
Jan 13 2005	Motion for leave to file amicus brief filed by Washington Legal Foundation. VIDED.
Jan 13 2005	Motion for leave to file amici brief filed by Visa U.S.A. Inc., et al. (VIDED)
Jan 14 2005	Motion for leave to file amici brief filed by Antitrust Scholars. (VIDED)
Jan 14 2005	Motion for leave to file amici brief filed by Chamber of Commerce of the United States, et al. (VIDED)
Jan 19 2005	Reply of petitioner Shell Oil Company filed.
Jan 19 2005	Opposition of respondents to motion of Chamber of Commerce of the United States filed. VIDED.
Jan 19 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jan 19 2005	Opposition of respondents to motion of Coca Cola Company and Microsoft Corporation filed. VIDED.
Jan 19 2005	Opposition of respondents to motion of Washington Legal Foundation filed. VIDED.
Jan 24 2005	Opposition of respondents to motion of Antitrust Scholars for leave to file brief amicus curiae filed. VIDED. (Distributed)
Jan 26 2005	DISTRIBUTED for Conference of February 18, 2005.
Feb 22 2005	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 26 2005	Brief amicus curiae of United States filed. VIDED.
Jun 7 2005	DISTRIBUTED for Conference of June 23, 2005.
Jun 8 2005	Supplemental brief of respondents Fouad N. Dagher, et al. filed. VIDED. Distributed)

Jun 27 2005	Motion for leave to file amicus brief filed by Washington Legal Foundation GRANTED.
Jun 27 2005	Motion for leave to file amici brief filed by Visa U.S.A. Inc., et al. GRANTED.
Jun 27 2005	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States, et al. GRANTED.
Jun 27 2005	Motion for leave to file amicus brief filed by Antitrust Scholars GRANTED.
Jun 27 2005	Petition GRANTED The case is consolidated with No. 04-805 and a total of one hour is allotted for oral argument.
Jul 14 2005	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including September 12, 2005. (VIDE)
Sep 12 2005	Motion for leave to file amicus brief filed by Verizon Communications Inc. (VIDED).
Sep 12 2005	Motion for leave to file amicus brief filed by American Petroleum Institute (VIDED).
Sep 12 2005	Brief amicus curiae of United States filed (VIDED).
Sep 12 2005	Joint appendix filed. VIDED.
Sep 12 2005	Brief of petitioner Shell Oil Company filed. VIDED.
Sep 12 2005	Brief of petitioner Texaco Inc. filed. VIDED.
Sep 12 2005	Motion for leave to file amicus brief filed by Northwest Ohio Physician Speciailists Cooperative, LLC (VIDED).
Sep 12 2005	Motion for leave to file amici brief filed by Chamber of Commerce of the United States, et al. (VIDED).
Sep 12 2005	Motion for leave to file amicus brief filed by Washington Legal Foundation (VIDED).
Sep 12 2005	Motion for leave to file amici brief filed by Visa U.S.A. Inc., et al. (VIDED).
Sep 12 2005	Motion for leave to file amici brief filed by American Bankers Association, et al. (VIDED).
Sep 15 2005	Respondent's opposition to motions of amici curiae for leave to file amicus briefs filed. VIDED.
Oct 5 2005	Extension of time within which to file resopndents' brief on the merits to and including November 10, 2005. VIDED.
Oct 11 2005	Motion for leave to file amicus brief filed by Northwest Ohio Physician Speciailists Cooperative, LLC GRANTED.
Oct 11 2005	Motion for leave to file amicus brief filed by American Bankers Association, et al. GRANTED.
Oct 11 2005	Motion for leave to file amicus brief filed by Visa U.S.A. Inc., et al. GRANTED.
Oct 11 2005	Motion for leave to file amicus brief filed by American Petroleum Institute

GRANTED.

Oct 11 2005 Motion for leave to file amicus brief filed by Verizon Communications Inc. GRANTED.

Oct 11 2005 Motion for leave to file amicus brief filed by Washington Legal Foundation GRANTED.

Oct 11 2005 Motion for leave to file amicus brief filed by Chamber of Commerce of the United States, et al. GRANTED.

Nov 1 2005 SET FOR ARGUMENT ON Tuesday, January 10, 2006.

Nov 10 2005 Brief amici curiae of Retail Industry Leaders Association and the Food Marketing Institute filed. VIDED.

Nov 10 2005 Brief amicus curiae of American Antitrust Institute filed. VIDED.

Nov 10 2005 Brief of respondents Fouad N. Dagher, et al. filed. VIDED.

Nov 14 2005 Motion for divided argument filed by respondents respondents. VIDED.

Nov 15 2005 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.

Nov 17 2005 CIRCULATED.

Nov 23 2005 Letter from counsel for respondents consenting to motion of the Solicitor General. VIDED.

Dec 12 2005 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED.

Dec 12 2005 Motion for divided argument filed by respondents DENIED. VIDED.

Dec 15 2005 Reply of petitioner Texaco Inc. filed. VIDED. (Distributed)

Dec 15 2005 Reply of petitioner Shell Oil Company filed. VIDED. (Distributed)

Jan 10 2006 Argued. For petitioners: Glen D. Nager, Washington, D.C.: and Jeffrey P. Minear, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Joseph M. Alioto, San Francisco, Cal.

(2)

Supreme Court, U.S.
FILED

04-814 DEC 14 2004

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is *per se* illegal under Section 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are petitioner Shell Oil Company (defendant below) and the following respondents (plaintiffs below): Fouad N. Dagher; Bisharat Enterprises Inc.; Alfred Buczkowski; Esequiel Delagado; Mahwash Farzaneh; Nasser El-Radi; G.G.&R. Petroleum Inc.; H.J.F. Inc.; Kaleco Co.; Carlos Marquez; Sami Merhi; Edgardo R. Parungao; Ron Abel Serv. Center, Inc.; Gullermo Ramirez; Jerry's Shell Serv. Center, Inc.; Leopoloo Ramirez; Nazar Sheibaini; Sitara Management Corporation; Tinsel Enterprises Inc.; Quang Truong; Steven Ray Vezerian; Los Feliz Shell, Inc.; and Nassim Hanna. Texaco Inc. is also a defendant in this action and is being served as a respondent. Saudi Refining Inc. was a defendant in this action but has been dismissed.

Petitioner Shell Oil Company is wholly owned by Shell Petroleum, Inc., a Delaware corporation whose shares are directly or indirectly owned 60% by Royal Dutch Petroleum Company, The Hague, Netherlands, and 40% by the Shell Transport and Trading Company, PLC, London, England.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6 ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 1

A. Factual Background 2

B. The Lower Courts' Rulings 4

REASONS FOR GRANTING THE PETITION 7

I. The Ninth Circuit's decision conflicts with decisions from other circuits on an important and recurring issue of antitrust law 7

II. The Ninth Circuit's decision is fundamentally wrong 13

III. The Ninth Circuit's decision will have a broad and highly disruptive impact on the formation of procompetitive business enterprises 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Maricopa County Med. Soc'y,
457 U.S. 332 (1982).....5, 16, 18

Augusta News Co. v. Hudson News Co.,
269 F.3d 41 (1st Cir. 2001).....8

Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc.,
441 U.S. 1 (1979).....6, 9, 13, 14

Catalano, Inc. v. Target Sales, Inc.,
446 U.S. 643 (1980) (*per curiam*).....16

Citizens Publ'g Co. v. United States,
394 U.S. 131 (1969).....17

City of Mt. Pleasant v. Associated Elec. Coop.,
838 F.2d 268 (8th Cir. 1988).....16

Continental T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977).....1, 5, 17

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984).....16

FTC v. Borden Co.,
383 U.S. 637 (1966).....4

FTC v. Indiana Federation of Dentists,
476 U.S. 447 (1986).....7

Jefferson Parish Hosp. Dist. No. 2 v. Hyde,
466 U.S. 2 (1984).....1

National Bancard Corp. v. Visa U.S.A., Inc.,
779 F.2d 592 (11th Cir. 1986).....8, 9

National Soc'y of Prof'l Engineers v. United States,
435 U.S. 679 (1978).....5

TABLE OF AUTHORITIES
(continued)

Page(s)

NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984) 6, 14

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 15

Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985) 10, 11

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) 10, 12

SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958 (10th Cir. 1994) 10

Standard Oil Co., 49 F.T.C. 923 (1953) 4

State Oil Co. v. Khan, 522 U.S. 3 (1997) 1

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 17

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 7

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S. Ct. 872 (2004) 19

Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119 (8th Cir. 1973) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

15 U.S.C. § 1 ..... *passim*
15 U.S.C. § 13(a) 4
28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

Antitrust Guidelines For Collaboration Among Competitiors, 4 Trade Reg. Rep. (CCH) ¶ 13, 161 (2000) 17, 20

HERBERT HOVENKAMP, *Antitrust Law* (2d ed. 2005) 9, 17, 18

Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871 (1994) 19, 20

Neal R. Stoll & Shepard Goldfein, *"Catch 22" for Joint Ventures*, 8/17/04 N.Y.L.J. 20

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-35a) is reported at 369 F.3d 1108. The District Court's opinions (App. 36a-74a) are unreported.

JURISDICTION

The Court of Appeals entered its judgment on June 1, 2004. The court denied a petition for panel and en banc rehearing on September 15, 2004. App. 75a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT

This Court has frequently granted certiorari to decide whether particular competitive restraints are properly analyzed under the rule of reason or instead subject to a *per se* rule of illegality. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (vertical resale price-fixing agreements); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (tying arrangement); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (vertical market division). This case raises that same fundamental issue in the context of an alleged "price fixing" agreement between partners to an economically integrated joint venture, where the venture set the same price for products that it sold under two different brand names.

Respondents in this case (plaintiffs below) have alleged that a *bona fide* joint venture between petitioner Shell Oil Company and Texaco Inc. violated Section 1 of the Sherman Act by setting the same wholesale price for the gasoline it produced, which it sold under the Shell and Texaco brand names. Plaintiffs made no attempt to show under the rule of reason that setting the same price for the two brands had anticompetitive effects within a relevant product market. Instead, plaintiffs charged that the venture's decision to price its own products in this manner constituted *per se* illegal "price fixing" by the venture's owners.

The District Court rejected plaintiffs' argument and entered summary judgment for Shell and Texaco. But in a 2-1 decision authored by Judge Reinhardt, the Ninth Circuit reversed. The court held that, even when a legitimate joint venture sets the price of its own products, the venture's policy of setting the same price for two different brands may be subject to *per se* condemnation. That ruling squarely conflicts with decisions of the First and Eleventh Circuits, which have held that the legality of joint venture pricing decisions must be analyzed under the rule of reason. The Ninth Circuit's decision also conflicts with decisions of the Seventh, Eighth, and D.C. Circuits, which have likewise held that competitive restraints subject to *per se* condemnation outside the joint venture context must be analyzed under the rule of reason when they contribute to the success of an economically integrated cooperative enterprise. Review is warranted to resolve this conflict and to correct the Ninth Circuit's flawed interpretation of the Sherman Act, which, if allowed to stand, will significantly deter the formation of procompetitive joint enterprises.

A. Factual Background

This case concerns two joint ventures formed by Shell and Texaco in 1998. The first, Equilon Enterprises LLC ("Equilon"), merged Shell's and Texaco's domestic gasoline

refining and marketing operations (so-called "downstream" operations) in the western United States. The second, Motiva Enterprises LLC ("Motiva"), merged the downstream operations of the two companies in the eastern United States. (Saudi Refining Inc. was also a partner in Motiva. Because plaintiffs never purchased any products from Motiva, and on that basis were held to lack standing to pursue claims against Saudi Refining, this petition will largely refer to Equilon alone.) Shell and Texaco continued to compete with each other in their domestic "upstream" operations (oil and gas exploration and production) and in both upstream and downstream operations elsewhere in the world. Upon formation of Equilon, however, Shell and Texaco no longer separately refined or marketed gasoline in the western United States.

The District Court found that Equilon was a legitimate, economically integrated joint venture, formed to reap cost savings and operating efficiencies with estimated values in the hundreds of millions of dollars. App. 49a, 65a. That finding was supported by undisputed evidence showing that Shell and Texaco contributed substantial assets to the joint venture (including refineries, pipelines, terminals, lubricant plants, research laboratories, and thousands of service stations), and agreed to share in the gains and losses of the venture in proportion to the assets they contributed (56% to Shell, 44% to Texaco). App. 65a. Shell and Texaco each contributed its respective brand name to Equilon, in the form of an exclusive license to sell gasoline under that brand name in the western United States. App. 65a-66a.

Shell and Texaco presented their plans to the Federal Trade Commission, which conducted a detailed year-long investigation. Antitrust regulators in California, Hawaii, Oregon, and Washington also reviewed the proposed venture. After completing their investigations, all of these entities approved the plans, subject to certain limited modifications that were made. App. 3a.

After formation, Equilon (rather than Shell or Texaco) refined and marketed the gasoline it sold to wholesale and retail customers in the western United States under the Shell and Texaco brand names. Equilon likewise set the wholesale prices for the gasoline that it refined and marketed.

To steer clear of issues under the Robinson-Patman Act, which prohibits price discrimination for products of "like grade and quality" (15 U.S.C. § 13(a)), Equilon charged the same price for Shell-branded gasoline as it charged for Texaco-branded gasoline in the same trade area. The two products are identical except for their brand names and additive packages. Products are not differentiated for Robinson-Patman Act purposes by separate brand identities (*FTC v. Borden Co.*, 383 U.S. 637 (1966)), and the Federal Trade Commission has held that "chemical analysis" is not the "important competitive factor" in retail gasoline distribution (*Standard Oil Co.*, 49 F.T.C. 923, 952 (1953)). Thus, while Equilon ultimately might have prevailed on any Robinson-Patman claims brought against it (as the Ninth Circuit surmised, App. 25a-26a), Equilon avoided the litigation costs and risks associated with such claims.

B. The Lower Courts' Rulings

The plaintiffs in this case are Shell and Texaco service-station operators. They sued under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging that Shell and Texaco had engaged in an unlawful "price fixing" conspiracy through Equilon's pricing policy. Plaintiffs waived any claim that Equilon's charging the same price for Shell- and Texaco-branded gasoline had any anticompetitive effects within a relevant market as required under traditional rule-of-reason analysis. Instead, plaintiffs alleged that Equilon's pricing policy constituted *per se* unlawful "price fixing" by Shell and Texaco.

Following extensive discovery, the parties filed cross-motions for summary judgment. The District Court granted

summary judgment for Shell and Texaco. The court rejected plaintiffs' argument that Equilon's setting of the prices for its own products could be condemned without regard to its actual competitive effects in a relevant market. The court noted that all joint ventures "must, at some point, set prices for the products they sell." App. 43a. Adoption of plaintiffs' theory, the court reasoned, would effectively result in "a per se rule against joint ventures between companies that produce competing products." App. 45a.

In a 2-1 decision, the Ninth Circuit reversed. The majority opinion began by observing that this Court has created a "two-tiered mode of analysis" for claims brought under Section 1 of the Sherman Act. App. 12a. The traditional mode of analysis is under the rule of reason, in which courts engage in a detailed inquiry to assess the challenged restraint's effect on competition in a relevant market. *See, e.g.*, *GTE Sylvania*, 433 U.S. at 49. The rule of reason is the "prevailing standard" for assessing the legality of most categories of restraints. *Id.*

The majority noted, however, that this Court has also held that certain narrow categories of restraints "'are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" App. 12a (quoting *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978)). Such restraints are deemed *per se* illegal as a categorical matter without regard to any procompetitive justifications that may exist for the restraint in a particular case. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 343-44 (1982). As the Ninth Circuit recognized, if the plaintiff "can establish that the defendants' conduct falls within the range of conduct considered illegal *per se*, it does not matter whether the particular application of the *per se* rule appears inefficient or unfair." App. 13a.

Price fixing, the court asserted, "is the quintessential example of a *per se* violation of § 1." App. 14a. But the court quickly acknowledged that, in the context of

economically integrated joint ventures, section 1's "blanket prohibition on price fixing . . . cannot be read literally." App. 15a. This Court held in *Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc.*, 441 U.S. 1 (1979), for example, that "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act." *Id.* at 9. When restraints that might otherwise be subject to *per se* condemnation are ancillary to a legitimate joint venture (*i.e.*, are "reasonably necessary to further the legitimate aims of the joint venture," App. 21a), they are analyzed under the rule of reason. *See, e.g., NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 101-03 (1984).

The Ninth Circuit held that the manner in which Equilon set the prices for its own products here could not be deemed "reasonably necessary to further the legitimate aims of the joint venture." App. 21a. In so holding, the court wrongly focused on the fact that Equilon had chosen to set "one, unified price for both the Texaco and Shell brands of gasoline," and then inquired whether *that* decision was reasonably necessary to further the aims of the venture. *Id.* But no court has ever held that the *specific price* chosen by a joint venture for its products is the relevant factor in determining whether the "price-fixing" label is appropriate. Instead, what triggers antitrust scrutiny in this context is the fact that competitors (acting through the joint venture) have *jointly* set the price for the venture's output. The only relevant question is whether such joint price-setting is reasonably necessary to the venture's success, not whether the specific price chosen is reasonably necessary. There was no dispute here that having Equilon set the prices for its products was reasonably necessary to accomplish the aims of the joint venture, since the venture's products could not be sold at all without some agreement on the price to be charged.

Judge Fernandez dissented on precisely this ground. He noted that, upon Equilon's formation, it "manufactured,

inventoried, transported, and marketed the products," and thus set the price "for *its* Shell and Texaco brands." App. 31a, 32a. Judge Fernandez concluded that Equilon's setting of the prices for its own products was obviously "reasonably necessary" to further the legitimate aims of the joint venture:

> "In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?"

App. 34a. In Judge Fernandez's view, the majority's "price-fixing" label was plainly inapplicable in this context.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS ON AN IMPORTANT AND RECURRING ISSUE OF ANTITRUST LAW.

The Ninth Circuit was correct in observing that certain practices – horizontal price fixing and "group boycotts" among them – so frequently prove to be anticompetitive that they are generally deemed illegal *per se* as a categorical matter. App. 12a-13a; *see United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (price fixing); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (group boycott). However, the Ninth Circuit applied the *per se* rule here even though plaintiffs' allegations of "price fixing" arise in the context of a concededly legitimate joint venture. The court's ruling directly conflicts with the decisions of other circuits, which have expressly held that restraints otherwise subject to *per se* condemnation must be analyzed under the rule of

reason when they are ancillary to the operation of an economically integrated joint venture.

The First and Eleventh Circuits have so held with respect to precisely the alleged restraint at issue in this case: price fixing. In *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001), the plaintiff brought an action under Section 1 of the Sherman Act against a joint venture formed by wholesale newspaper and magazine distributors to service the regional needs of large chain retailers. The plaintiff argued that the joint venture's practice of paying up-front fees to chain retailers on a per-store basis constituted a form of price fixing and was therefore *per se* illegal. *Id.* at 47.

The First Circuit squarely rejected this contention. The court acknowledged that the joint venture consisted of "local distributors who were at least potential rivals," and that by combining to seek regional customers the local distributors "might be viewed as acting through [the joint venture] to 'agree' on up-front payments to the buyers." *Id.* at 48. Nonetheless, the court held that this could not be deemed conduct that was *per se* illegal because "it is a standard form of joint venture for local firms to combine to provide offerings . . . that none could easily provide by itself, *and a joint venture often entails setting a single price for the joint offering*." *Id.* (emphasis added). A joint venture's price setting could be found unlawful in some circumstances, the court concluded, but only under the rule-of-reason standard, which the plaintiff in *Augusta News* (like plaintiffs in this case) did not even attempt to satisfy. *Id.*

The Eleventh Circuit reached the same conclusion in *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986). There, the plaintiff alleged that Visa (essentially a joint venture comprised of member banks) had violated Section 1 of the Sherman Act "by fixing certain bank credit card interchange rates." *Id.* at 593. The plaintiff argued that, because the member banks "individually can and should negotiate the interchange fee," Visa's setting of the fee

"amounts to horizontal price fixing and is per se violative of Section 1 of the Sherman Act." *Id.* at 596. Relying on this Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979), the Eleventh Circuit held that the interchange fee could not be declared *per se* illegal but instead had to be analyzed under the rule of reason. 779 F.2d at 601-02. The court concluded that Visa's setting of the fee "must be weighed under the rule of reason" because "the restraint is 'a necessary consequence of the integration necessary to achieve [the] efficiencies'" created by the joint enterprise. *Id.* at 602 (quoting *Broadcast Music*, 441 U.S. at 21).

The Ninth Circuit's holding in this case stands in direct conflict with these decisions. Equilon was a production and marketing joint venture and its aims could be accomplished only by selling the venture's output. The venture, of course, could not sell the gasoline it produced without setting a sales price. Thus, price-setting was "'a necessary consequence of the integration necessary to achieve [the] efficiencies'" of the joint venture. *National Bancard*, 779 F.2d at 602. The First and Eleventh Circuits properly held that "price fixing" necessary to achieve a joint venture's efficiencies must be analyzed under the rule of reason. In disregarding this principle, the Ninth Circuit not only brought itself into conflict with these circuits, but also ignored the teaching of leading commentators in the field. *See, e.g.*, XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2132c, at 179-80 (2d ed. 2005) ("[The] joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold. When joint owners are also competitors, the result is literally 'price fixing,' but it is a form of price fixing that should, when bona fide, be examined under the rule of reason.").

The Ninth Circuit's application of the *per se* rule to alleged price fixing in the joint venture context also conflicts with decisions of other circuits that have held similar restraints subject to rule-of-reason analysis. In *Worthen Bank & Trust*

Co. v. National BankAmericard Inc., 485 F.2d 119 (8th Cir. 1973), for example, the Eighth Circuit reversed the district court's holding that a BankAmericard bylaw prohibiting member banks from issuing rival MasterCharge cards could be declared *per se* illegal as a form of group boycott. The court held that, although group boycotts are "[a]mong those types of agreements which have been classified as per se violations," the challenged bylaw had to be "tested at trial under the 'rule of reason'" because it was a restraint ancillary to the joint venture's operation. *Id.* at 124, 125; *see also SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 964-65 (10th Cir. 1994) (upholding, under rule of reason, similar Visa bylaw prohibiting member banks from issuing Discover cards, and noting that this Court's cases have "clarif[ied] the inappropriateness of automatically invoking *per se* scrutiny of a joint venture's alleged antitrust violation").

The D.C. Circuit has also rejected application of the *per se* rule to competitive restraints ancillary to the operation of a legitimate joint venture. In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.), the court confronted a rule imposed by Atlas (a network of independent moving companies that the court likened to a "complex partnership") which prohibited Atlas affiliates from handling interstate carriage for their own accounts as well as for Atlas. *Id.* at 213. The court acknowledged that Atlas's policy "may be characterized as a boycott, or a concerted refusal to deal," since it "involves an agreement not to deal with those who do not comply with Atlas' policy." *Id.* at 215. But the court held that this restraint on competition could not be deemed illegal *per se* because it was ancillary to an efficiency-enhancing joint enterprise, "in the sense that it serves to make the main transaction more effective in accomplishing its purpose." *Id.* at 224.

Additionally, the Ninth Circuit's decision conflicts with the Seventh Circuit's decision in *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985) (Easterbrook,

J.). That case, too, involved a horizontal restraint on competition that would have been deemed illegal *per se* outside the context of a legitimate joint venture, since it involved two competitors agreeing not to compete with one another in the sale of specified products from their adjoining stores. *Id.* at 187. The Seventh Circuit rejected the district court's condemnation of this restraint as illegal *per se* because the restraint was ancillary to a bona fide joint venture between the two companies. The court stated: "A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote." *Id.* at 188-89. The restraint at issue in *Polk Bros.* was part of a legitimate joint endeavor – namely, the construction of adjoining stores offering complementary lines of products for the home – and the restraint promoted the success of the venture because without it the two companies would not have entered into the venture in the first place, given the legitimate "free riding" concerns that existed there. *Id.* at 190. The court therefore applied the rule of reason. *Id.*

The Ninth Circuit's decision squarely conflicts with each of these cases as well. The courts in these cases drew a sensible distinction between competitive restraints that are "naked" and those that are "ancillary," and applied the rule of reason to ancillary restraints even if they would otherwise be subject to *per se* treatment outside the joint venture context. As the Seventh Circuit stated in *Polk Bros.*: "The reason for distinguishing between 'ancillary' and 'naked' restraints is to determine whether the agreement is part of a cooperative venture with prospects for increasing output. If it is, it should not be condemned *per se*." 776 F.2d at 190. The Solicitor General has recently advocated the same rule in this Court: "An agreement not to compete that is ancillary to a lawful agreement is properly analyzed under the rule of reason, rather than the per se rule." Brief for the United States as

Amicus Curiae in *Andrx Pharmaceuticals, Inc. v. Kroger Co.*, O.T. 2003, No. 03-779, at 13 n.6.

The Ninth Circuit treated Equilon's setting of the prices for the products it sold as a naked agreement to fix prices, rather than an agreement ancillary to operation of the joint venture itself. But Equilon's setting of the prices for its own goods was clearly part of a cooperative venture between Shell and Texaco that had the potential to increase output through cost savings and efficiency gains, and it "serve[d] to make the main transaction more effective in accomplishing its purpose." *Rothery Storage*, 792 F.2d at 224. Indeed, without an agreement between the joint venture partners on the price at which the venture's goods would be sold, the "main transaction" could not have accomplished its purpose at all.

The Ninth Circuit's scrutiny of the *specific price* Equilon set for its products, as a basis for determining whether the *per se* rule applied, is also at odds with the cases discussed above. The Ninth Circuit asked whether Equilon's charging the same price for Shell- and Texaco-branded gasoline was "reasonably necessary" to the joint venture's operation. Neither the First Circuit in *Augusta News* nor the Eleventh Circuit in *National Bancard*, however, analyzed whether it was reasonably necessary for the joint ventures in those cases to set the challenged fees at the *specific level* that they did. The courts instead analyzed only whether jointly establishing a fee of some amount (whatever that amount might be) was reasonably necessary to promote the success of the venture. The Ninth Circuit erred here by demanding a showing not simply that Equilon's setting of the prices for its own products was reasonably necessary to the success of the venture, but that the specific price it chose for those products was itself reasonably necessary. No precedent supports such a requirement.

Review is warranted to resolve the conflict between the decision below and the decisions of other circuits that have properly analyzed restraints ancillary to the operation of

legitimate joint ventures under the rule of reason. If there is any doubt about whether review should be granted here, the Court should call for the views of the Solicitor General.

II. THE NINTH CIRCUIT'S DECISION IS FUNDAMENTALLY WRONG.

That the Ninth Circuit's decision conflicts with well-reasoned opinions from other circuits addressing the applicability of the *per se* rule to joint ventures is itself a reflection of the flawed nature of the Ninth Circuit's holding. But the fundamental flaws in the decision are revealed even more starkly by the Ninth Circuit's divergence from core principles of antitrust law established by this Court's cases.

The legal principles that should have guided the Ninth Circuit's analysis were established by a trio of decisions in which this Court *reversed* application of the *per se* rule in the joint venture context. The first of these cases, *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979), involved blanket licenses issued by associations comprised of composers and publishing houses that authorized unrestricted use of their members' copyrighted works in exchange for a set fee. The court of appeals held that the blanket license constituted price fixing "in the literal sense" and was therefore *per se* illegal, because the composers and publishing houses had "joined together into an organization that sets its price for the blanket license it sells." *Id.* at 8-9.

This Court acknowledged that "agreements among competitors to fix prices are among those concerted activities that the Court has held to be within the *per se* category." *Id.* at 8. But the Court rejected the court of appeals' "literal approach," noting that simply because a practice can be labeled "price fixing" in the literal sense does not mean that it is *per se* illegal: "Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per*

se in violation of the Sherman Act." *Id.* at 9.

The Court held that the blanket license was not subject to the *per se* rule because the association's establishment of a set fee for the blanket license was a necessary step in offering the blanket license at all. None of the individual composers could establish the price for the blanket license because that license did not belong to them individually and indeed was beyond the realm of what any one individual composer could offer. The blanket license thus could be priced only by the association itself. *Id.* at 22. The Court stated in general terms equally applicable here: "Joint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing conspiracies, where the agreement on price *is necessary to market the product at all.*" *Id.* at 23 (emphasis added). Contrary to the analysis pursued by the Ninth Circuit below, the Court did *not* engage in any inquiry concerning the necessity for the particular price the association set for its blanket license.

The Court again considered competitive restraints imposed in connection with a joint venture in *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984). There, the Court invalidated a rule adopted by the National Collegiate Athletic Association that limited the number of football games each school could televise and essentially fixed the price the networks paid to televise each game. Significantly, however, the Court refused to apply a *per se* rule of illegality, notwithstanding its recognition that "[h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach." *Id.* at 100. Instead, the Court treated the NCAA as a cooperative venture among competitors and analyzed the challenged restraints under the rule of reason, because the case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101.

The last in the trio of cases is *Northwest Wholesale*

Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). In that case, the Ninth Circuit declared *per se* illegal a cooperative buying association's expulsion of a member on the ground that such action constituted a group boycott or concerted refusal to deal. This Court reversed, holding that the Ninth Circuit had erred by applying the *per se* rule instead of analyzing the association's conduct under the rule of reason. The Court noted that "[w]holesale purchasing cooperatives such as Northwest are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects." *Id.* at 295. Nor, the Court stated, would expulsion from such a cooperative "characteristically be likely to result in predominantly anticompetitive effects," unless it could be shown that "the cooperative possesses market power or exclusive access to an element essential to effective competition." *Id.* at 296. Since no such showing had been made, the Court ruled that the Ninth Circuit "failed to exercise the requisite care and applied *per se* analysis inappropriately." *Id.* at 298.

The Ninth Circuit's decision in this case cannot be squared with the general principles established by this Court. Equilon's pricing of the gasoline it produced and marketed under the Shell and Texaco brands was no less essential to the operation of the joint venture than the associations' establishment of a set fee for the blanket licenses offered in *Broadcast Music*. Without *some* agreement as to the price it would charge for its products, Equilon could not sell those products at all. Nor did plaintiffs demonstrate that having Equilon set the prices for its products would "characteristically be likely to result in predominantly anticompetitive effects," since plaintiffs made no showing that Equilon possessed market power. *See Northwest Wholesale Stationers*, 472 U.S. at 296. The Ninth Circuit therefore erred in subjecting the pricing decision in this case to *per se* treatment rather than analyzing it under the rule of reason. Indeed, to the extent that the Ninth Circuit's ruling is

based upon the application of Section 1 to post-formation decisions by the management of a single, fully integrated business venture, it is inconsistent with numerous opinions of this Court and the courts of appeals holding that the unilateral decisions of such an entity are not subject to Section 1 scrutiny at all. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982); *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 276-77 (8th Cir. 1988).

The Ninth Circuit found it "significant" that, in establishing the price for the Shell and Texaco brands, Equilon "unified" the price for both brands. App. 23a. As alluded to earlier, however, that fact is entirely irrelevant to appropriate antitrust analysis. It would be no less "price fixing" for Shell and Texaco to agree that they would charge two dollars per gallon for Shell gasoline and three dollars for Texaco gasoline (or vice versa) than if the two companies agreed to charge three dollars per gallon for both brands. What matters is that two former competitors (acting through the joint venture) set the prices for the brands by agreement; the particular price they agreed upon is of no consequence. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*) (it "is no excuse that the prices fixed are themselves reasonable"). The antitrust laws do not require an entity that sells products under multiple brands to price products bearing one brand name differently from products bearing another brand name.

The Ninth Circuit attempted to deflect the charge that application of a *per se* rule in this context will render unlawful virtually all marketing joint ventures by stating that its analysis would be different if Equilon had combined the Shell and Texaco brands into "one collective brand" or if Equilon had been formed to market a new product. App. 28a. But this attempt to cabin the reach of the court's holding simply highlights its fundamental defects. The court offered

no explanation for why it would matter if a legitimate joint venture's output is sold under one brand name instead of two. The underlying "price fixing" is the same and the same antitrust concerns are implicated regardless of whether one brand is involved or two. As this Court held in another context, "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *GTE Sylvania*, 433 U.S. at 58-59. It is likewise beyond dispute that it is legitimate to form a joint venture to achieve efficiencies in production of pre-existing products, as well as to develop new products. *Antitrust Guidelines For Collaboration Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) (available at <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>) § 2.1 ("consumers may benefit from competitor collaborations in a variety of ways," including "allow[ing] [a joint venture's] participants to better use existing assets" – for instance, by facilitating "the attainment of scale or scope economies beyond the reach of any single participant"); XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2104a, at 40 (2d ed. 2005) ("Joint ventures are presumably good things because they reduce firms' costs of enabling firms to do things that they could not otherwise do, *or to do them better*.") (emphasis added).

In an attempt to shore up the holes in its reasoning, the Ninth Circuit erroneously relied on three cases in which this Court upheld application of the *per se* rule in the joint venture context. All three are easily distinguished. In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), the Court applied the *per se* rule because the "joint venture" was a mere sham designed to mask a naked horizontal agreement to allocate territories. *Id.* at 597 ("That the trade restraints were merely incidental to an otherwise legitimate 'joint venture' is, to say the least, doubtful."). Here, in contrast, the joint venture at issue is indisputably *bona fide*.

In *Citizens Publ'g Co. v. United States*, 394 U.S. 131

(1969), the two daily newspapers in Tucson, Arizona, created an operating entity to set advertising and subscription rates for both newspapers but did not contribute their core operations – the news and editorial units – to the venture. The venture therefore set agreed-upon prices for substantial portions of the newspapers' operations that it did not own. Here, however, Equilon owned the entirety of the combined downstream operations and did not have a role in pricing *any* non-venture output. Application of the *per se* rule was therefore inappropriate. *See* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1908e, at 263-64 (2d ed. 2005) (so long as joint venturers do not "enter into any agreement to fix the price of their nonventure output," no charge of *per se* illegality is appropriate).

Finally, in *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), the Court found a purported joint venture among physicians to be *per se* illegal because the venture consisted solely of the physicians' agreement on the maximum prices they would charge for particular procedures. The venture was not truly integrated for antitrust purposes because it was "not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Id.* at 356. As noted above, it is undisputed that Equilon was an economically integrated joint venture, with Shell and Texaco sharing the risks and rewards of the venture in proportion to the substantial assets each contributed.

III. THE NINTH CIRCUIT'S DECISION WILL HAVE A BROAD AND HIGHLY DISRUPTIVE IMPACT ON THE FORMATION OF PROCOMPETITIVE BUSINESS ENTERPRISES.

Joint ventures and other similar cooperative enterprises are an increasingly common form of business organization. Thomas A. Piraino, Jr., *Reconciling Competition and*

Cooperation: A New Antitrust Standard for Joint Ventures, 35 Wm. & Mary L. Rev. 871, 873 (1994) (noting that "the number of new strategic alliances in the United States has nearly doubled in each of the last ten years"). Joint ventures offer companies the ability to reap the efficiency-enhancing benefits of joint activity in circumstances where a complete merger of all of their operations is either undesirable or infeasible. This is an area of the law in which businesses require clear, predictable rules establishing what is lawful and what is not, as well as national uniformity on the nature of those ground rules.

The Ninth Circuit's decision, if left unreviewed, will have profoundly unsettling effects on both fronts. Its most immediate effect is to throw into question the soundness of the line that has been drawn between those restraints in the joint venture context that are subject to *per se* condemnation and those that are subject to analysis under the rule of reason. By significantly diverging from the antitrust principles this Court and other circuits have established, the Ninth Circuit's decision has rendered a critical area of the law highly *uncertain*, and that uncertainty will inevitably deter the formation of procompetitive and efficiency-enhancing joint enterprises. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 882 (2004) ("false condemnations" under the antitrust laws "are especially costly, because they chill the very conduct the antitrust laws are designed to protect") (internal quotation marks omitted). Businesses cannot risk "the severe sting of antitrust liability" (App. 34a (Fernandez, J., dissenting)) posed by the treble damages and attorneys' fees available under Section 1 of the Sherman Act.

At the same time, the Ninth Circuit's decision necessarily undermines the national uniformity needed in this area of the law. Although ostensibly applicable only within the western States and territories within its jurisdiction, the Ninth Circuit's ruling will undoubtedly have nationwide impact,

given the broad geographic scope of many joint ventures. Any joint venture that operates in markets throughout the country cannot take comfort in the fact that no circuit other than the Ninth has declared a joint venture's decision to price its own products (at least when marketed under more than one brand name) *per se* illegal. The circuit conflict spawned by the Ninth Circuit's decision leaves the law in an intolerable state of uncertainty for any business venture that will operate on a national level. *See* Neal R. Stoll & Shepard Goldfein, *"Catch 22" for Joint Ventures*, 8/17/04 N.Y.L.J. at 3 (criticizing Ninth Circuit's decision on this score).

These far-reaching effects would be sufficient, standing alone, to render the Ninth Circuit's decision of sufficient importance to warrant review by this Court. But the Ninth Circuit's decision also severely undermines the principles jointly established by the agencies of the federal government responsible for overseeing enforcement of the antitrust laws. In their recently promulgated *Antitrust Guidelines For Collaboration Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000), the Antitrust Division of the Department of Justice and the Federal Trade Commission attempted to provide businesses with precisely the sort of clear guidance needed in this area. The Ninth Circuit's decision, however, is completely at odds with the principles established in the *Collaboration Guidelines*, which state: "If . . . participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal." *Collaboration Guidelines* § 3.2. As explained above, Equilon was indisputably an "efficiency-enhancing integration of economic activity," and its setting of the prices for the products it sold was "reasonably necessary to achieve its procompetitive benefits." *Id.* Under the *Collaboration Guidelines*, the restraint at issue in this case

would have been reviewed under the rule of reason, not subjected to the *per se* rule the Ninth Circuit erroneously imposed.

In short, the Ninth Circuit has issued a deeply flawed decision on an important and recurring issue of antitrust law, which will have serious adverse effects on economic activity at a national level if allowed to stand. Review is plainly warranted.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 1, 2004

No. 02-56509

FOUAD N. DAGHER, ET AL.,

v.

SAUDI REFINING INC., ET AL.

June 1, 2004

REINHARDT, Circuit Judge.

Plaintiffs Fouad N. Dagher, et al., appeal from the district court's award of summary judgment to the defendants, Texaco, Inc., Shell Oil Co., and Saudi Refining, Inc. (SRI), et al. The plaintiffs represent a class of 23,000 Texaco and Shell service station owners who allege that the defendants conspired to fix the nationwide prices for the Shell and Texaco brands of gasoline through the creation of a national alliance consisting of two joint ventures. The district court granted two summary judgment motions: one to dismiss defendant SRI because the plaintiffs lacked antitrust standing; the other to dismiss the complaint against the remaining defendants because the plaintiffs failed to raise a triable issue of fact as to whether the Sherman Antitrust Act's *per se* prohibition against price fixing is applicable to the economic arrangements between the defendants. We affirm the district court's ruling as to the plaintiffs' standing to sue SRI, but reverse the district court's decision that the plaintiffs failed to create a triable issue of fact under the Sherman Act.

APPENDIX A

I. Factual and Procedural History

A. Factual History

Texaco, Inc., and Shell Oil Co. were once fierce competitors in the national oil and gasoline markets. They competed at both wholesale and retail levels, and in both upstream and downstream operations.[1] The two companies generally operated by independently refining gasoline and then selling the gas either to licensed Texaco and Shell service stations or to wholesale distributors.

From 1989 to 1998, defendants Saudi Refining, Inc. (SRI) and Texaco sold gas on the East Coast through Star Enterprise, a joint venture "engaged in the refining and marketing of gasoline under the Texaco brand." Both Shell and Texaco sensed intensified competition in the downstream operations of their industry--they similarly believed that "the oil industry was about to enter a period of consolidation." To respond to the heightened competition in the oil and gas industry, Shell approached Texaco in 1996 about several potential corporate combinations designed to enhance efficiency and reduce competition between the two companies with respect to the downstream refining and marketing of gasoline. In 1998, preliminary discussions yielded an agreement to form a nationwide alliance (hereinafter: "the alliance")[2] consisting of two separate joint

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[1] The parties have explained in their joint stipulations that "[c]rude oil is the raw product from which gasoline is made at a refinery. Upstream operations consist of exploring for and producing crude oil, and downstream operations consist of refining crude into gasoline and other products and marketing the finished products."

[2] Defendants dispute that an "alliance" existed and characterize Equilon and Motiva as distinct entities. Appellees' Brief, at 46. While the defendant corporations did not create a new legal entity called "The Alliance," the record establishes beyond dispute that representatives of Texaco and Shell generally referred to the two joint ventures as part of a

ventures.[3] One joint venture was named "Equilon Enterprises" (Equilon); it combined Shell's and Texaco's downstream operations in the western United States. The other venture, formed by Texaco, Shell, and SRI, was named "Motiva Enterprises" (Motiva); it combined the three companies' downstream operations in the eastern United States. The alliance had a national market share of 15% of all gasoline sales, and on the West Coast, Equilon's market share exceeded 25%.

There is a voluminous record documenting the economic justifications for creating the joint ventures. After analysis by teams made up of representatives of all three companies, the defendants concluded that numerous synergies and cost efficiencies would result. The defendants concluded that nationwide there would be up to $800 million in cost savings annually. The Federal Trade Commission and several State Attorneys General approved the formation of the joint ventures, subject to modifications demanded by both the federal agency and the various Attorneys General.

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single project to combine the two companies' nationwide refining and marketing operations. Moreover, the record confirms that the single project was often referred to as "an alliance," and frequently called "The Alliance," by representatives of Texaco, Shell, and SRI, and by Board Members from the two joint ventures, "Equilon Enterprises" (Equilon) and "Motiva Enterprises" (Motiva). When we refer to "the alliance," we therefore refer to the combined national refining and marketing operation consisting of Equilon and Motiva--an enterprise which was created, developed, and maintained collectively by the individual defendant corporations.

[3] The district court explained the massive scope of the alliance: "[t]he downstream assets in Equilon and Motiva include twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees."

APPENDIX A

The creation of the alliance ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline. Texaco and Shell signed non-competition agreements which prohibited them from competing with either Equilon or Motiva and committed them "not to engage in the manufacturing and marketing of certain products in the [relevant] geographic area[s], including fuel, synthetic gasoline, and electricity." The two joint ventures established fixed ratios for profit sharing and for bearing the risk of losses. In Equilon, Shell has a 56% interest while Texaco owns 44%. In Motiva, Shell owns 35%, while SRI and Texaco each own 32.5%.

Despite the collective assumption of risk and resource pooling in the joint ventures, Shell and Texaco continued to operate as distinct corporations. Each retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand. Under the joint venture agreements, Equilon and Motiva market Shell and Texaco gasoline under licensing agreements governing both the sale of the products and the use of the Shell and Texaco trademarks. Each company maintained its ability to return to individual sales and marketing--the joint ventures contain provisions allowing for dissolution at any time by mutual consent or, after five years time, by unilateral dissolution with two years advance notice.

The various agreements between the oil companies allowed Texaco and Shell to consolidate and unify the pricing of the Texaco and Shell gasoline brands within the Equilon and Motiva joint ventures. Before creating the two joint ventures, Shell, Texaco, and Star all independently set prices for their wholesale and retail sales, generally through decisions made by their corporate pricing units. Testimony in the record reveals that, either immediately before the formation of the

joint ventures or sometime shortly thereafter, "a decision was made that the Shell and Texaco brands would have the same price in the same market areas." The decision to charge the same price for the two distinct brands "was developed as sort of an operating requirement right from the very start or near to the very start of the alliance." Equilon and Motiva integrated this pricing decision into a project named "The Strategic Marketing Initiative" (SMI), which sought to develop ways in which the alliance could produce and promote both brands more competitively. There is some evidence in the record establishing that the decision to set one price for the two brands was conceived of in the SMI even before Motiva was formed.[4]

The alliance consolidated pricing of the Texaco and Shell brands such that a single individual at each joint venture was responsible for setting a coordinated price for the two brands. The joint ventures did, however, continue to adjust the pegged price of the brands to each unique geographic sale area. The pricing was consolidated despite the fact that Texaco and Shell maintained each brand as a distinct product --each brand has its own unique chemical composition (the gasoline is differentiated by separate packages of "additives"), trademark, and marketing strategy--and competed for customers "at the pump." The companies, and the joint ventures, continued to target each brand at a different customer base--"Texaco customers tend to be more blue-

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[4] The record does not establish with certainty whether the decision to price the two brands together was actively discussed during the SMI. The evidence does show that the SMI included a "price optimization" program. And there is some evidence in the record that the price optimization program ratified the unofficial decision to move toward unitary pricing--one witness testified that the price optimization program included "a policy or a procedure to charge the same prices to both--to similar classes of trade in the same marketing areas and to effect those-- to effect those changes."

collared and rural than Shell customers, who are more affluent and urban."

The price optimization program may have allowed Equilon and Motiva to raise gasoline prices at a time when the price of crude oil was low and stable. During a time when crude oil prices reached near-historic lows--the price of crude oil decreased from $12 to $10 per barrel between September 1998 and February 1999--Equilon raised its prices $.40 per gallon in Los Angeles and $.30 per gallon in both Seattle and Portland.

B. Procedural History

The plaintiffs commenced this civil action in the United States District Court for the Central District of California. They brought suit on behalf of themselves and approximately 23,000 Shell and Texaco service station owners, alleging that defendants SRI, Texaco, Shell, Motiva, Equilon, Equiva Trading Co., and Equiva Services, LLC, engaged in a price fixing scheme to raise and fix gas prices through the alliance and the two joint ventures, Motiva and Equilon, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The plaintiffs disclaimed any reliance on the traditional "rule of reason" test, instead resting their entire claim on either the per se rule or a "quick look" theory of liability.

The defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6). The issue with respect to the 12(b)(6) motion was "whether the alleged agreement among Saudi, Shell, and Texaco is an unreasonable restraint of trade ... under either the *per se* rule or a 'quick look' rule of reason analysis." The district court denied the motion. The court found that although the *per se* rule against price fixing plainly does not make all price-restraining joint ventures illegal, neither does "[a]n agreement to fix prices ... merit full rule of reason treatment solely because it is part of a broader joint venture agreement." The court explained that "price fixing can still

be illegal per se even if it accompanies an efficient, integrated joint venture. If the joint venture could function perfectly well without price fixing, then the price fixing amounts to no more than an extraneous, anticompetitive restraint that does not merit rule of reason analysis." The district court found that the plaintiffs' complaint alleged sufficient facts to demonstrate that the alliance's price setting regime was a naked, rather than an ancillary, restraint on trade.[5] The district court disposed of the plaintiffs' alternative theories of liability--the plaintiffs originally alleged a "market division" theory and a "manipulation of leases" theory to support their *per se* Section 1 violation--but gave plaintiffs leave to amend.

The parties filed cross-motions for summary judgment. The district court decided the motions in two separate orders. The first order granted SRI's motion for summary judgment on the ground that the plaintiffs lacked antitrust standing because no plaintiff had ever bought gasoline, or other products, from the Motiva joint venture or directly from SRI and because the plaintiffs lacked "direct or circumstantial evidence 'sufficiently unambiguous to permit a trier of fact to find that [SRI] conspired' to fix prices in the western United States absent 'any apparent motive to do so.'" (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

The second order granted the remaining defendants' motion for summary judgment on the ground that the rule of reason, not the *per se* or "quick look" rules, governed the Sherman Act analysis of the joint ventures. The district court applied its own analytical framework, consisting of two questions:

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[5] A "horizontal agreement [is] 'naked' if it is formed with the objectively intended purpose or likely effect of increasing price or decreasing output in the short run, with output measured by quantity or quality." XI HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1905, at 210 (1998) (hereinafter: HOVENKAMP).

"(1) whether a reasonable trier of fact could conclude that Equilon and Motiva are either mere window-dressings for a price fixing conspiracy or (2) whether they are otherwise patently anticompetitive." The court concluded--relying on the detailed and costly negotiations leading up to the creation of the joint ventures--that Equilon and Motiva were plainly not "fly-by-night" operations designed to cover up an elaborate price-fixing scheme. Moreover, the court found that Motiva and Equilon produced sufficient efficiencies and were sufficiently integrated to constitute indisputably legitimate joint ventures under either the *per se* rule or a "quick look" analysis. Finally, the district court concluded that, because every joint venture "must, at some point, set prices for the products they sell" (citation omitted), a theory which made it illegal for a joint venture to fix prices of its various brands would "act as a per se rule against joint ventures between companies that produce competing products."

II. Standard of Review

We review a district court's grant of summary judgment *de novo*. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). Taking the evidence in the light most favorable to the nonmovant, we must consider whether there are any genuine issues of material fact and whether the district court properly applied the pertinent substantive law. *City of Tacoma*, 332 F.3d at 578; *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996). All inferences must be drawn in favor of the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "In antitrust cases, these general standards are applied even more stringently and summary judgments granted more sparingly." *Beltz Travel Service, Inc. v. International Air Transport Ass'n.*, 620 F.2d 1360, 1364 (9th Cir. 1980) (citations omitted). As the

APPENDIX A

Supreme Court explained in *Puller v. Columbia Broadcasting Sys. Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962):

> [S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Id. at 473, 82 S.Ct. 486.

III. Standing

The district court found that the plaintiffs lacked standing to sue SRI. The court's decision was based upon two considerations: first, none of the named plaintiffs had ever purchased any products from SRI or from Motiva; and second, the plaintiffs failed to produce sufficient evidence linking SRI to a conspiracy to fix prices in the Western United States. There is no dispute that the plaintiffs never purchased any products from SRI, or from Motiva. Nor is there any doubt that SRI did not sign any of the documents establishing Equilon, did not refine or market gasoline in the Western United States, and had no motive to conspire with Shell and Texaco to fix those brands' prices in the West. Yet the plaintiffs maintain that SRI engaged in a nationwide price-fixing conspiracy with Texaco and Shell through its participation in Motiva, and therefore is liable for all of the acts of each conspiracy member. *See Beltz Travel,* 620 F.2d at 1367; *see also* Appellants' Brief, at 42.

The plaintiffs rest their theory of standing on the existence of a national conspiracy--and, in this case, defendants Texaco, Shell, Equilon, and Motiva have admitted that they fixed

prices by charging the same price for the Texaco and Shell brands. But the plaintiffs do not establish standing under our precedent simply by showing that SRI was involved to some extent in the planning of certain aspects of the alliance. Rather, "[f]or an agreement to constitute a violation of section 1 of the Sherman Act, a 'conscious commitment to a common scheme designed to achieve an unlawful objective' must be established." *Toscano v. PGA,* 258 F.3d 978, 983 (9th Cir. 2001) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775, (1984)).

The plaintiffs did proffer evidence showing that Equilon and Motiva were formed as the result of a series of negotiations designed to create a national alliance. Apparently, Shell originally approached the other parties with "ideas about a larger alliance" and explored the possibility of a nationwide alliance. The record contains clear evidence showing that Equilon and Motiva were conceived of as a single strategy to create a national operating structure, separated solely for the sake of efficiency. Moreover, the plaintiffs point to substantial evidence that Equilon and Motiva made pricing decisions together via cooperation through their marketing departments.

Still, the plaintiffs have failed to provide evidence sufficiently implicating SRI in the nationwide price-fixing scheme. The district court found that SRI had "no apparent motive to conspire with Shell and Texaco with respect to Equilon and the Western United States," largely because SRI "would not benefit from any potential anticompetitive effects in Equilon's territory." The plaintiffs have offered no evidence to the contrary. In fact, the record shows unequivocally that SRI's interests were limited to the operation of Motiva and the refining and marketing of gasoline in the Eastern portion of the nation, and that, even there, SRI vigorously protested the domination of the Motiva Board by Shell and Texaco representatives. SRI lamented

that the Motiva Board members, who were corporate representatives of Texaco and Shell, and many of whom were also members of the Equilon Board, appeared to be making their decisions for the nationwide "alliance" rather than for the individual joint ventures.[6] The record thus demonstrates that--far from engaging in a nationwide conspiracy--SRI had little interest in acceding to the "cooperative" efforts by "common Motiva and Equilon Board members, from Shell and Texaco." In short, the plaintiffs failed to produce evidence that SRI had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto,* 465 U.S. at 764, 104 S.Ct. 1464. Although the issue is a close one, we affirm the district court's holding that the plaintiffs failed to establish that SRI participated in the operation of a nationwide price-fixing alliance or in the fixing of prices in the Western region of the United States.

IV. Liability under the Sherman Antitrust Act

"No antitrust violation is more abominated than the agreement to fix prices. With few exceptions, 'price-fixing agreements are unlawful *per se* under the Sherman Act and ... no showing of so-called competitive abuses or evils which

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[6] One board member who represented SRI in Motiva observed that, "once the Equilon Board takes a position on an issue common to both Motiva and Equilon, Shell and Texaco will have a strong desire to have the same action taken in Motiva." The member further stated:

> As is exhibited by Motiva's incorrect reference to the Alliance, rather than Motiva, at the bottom of page 7 and the top of page 8 of the attached Business Plan writeup, the 'focus on Motiva' message will have to be repeated often to get it accepted. The more we allow "Alliance" to dominate, the greater the likelihood that personal behavior will favor "Alliance" over Motiva and the greater the likelihood that sub-optimizations of Motiva, in favor of the Alliance, will occur. We are on alert in this regard but the "Alliance" force is a large one.

those agreements were designed to eliminate or alleviate may be interposed as a defense.' The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred." *Freeman v. San Diego Ass'n of Realtors,* 322 F.3d 1133, 1144 (9th Cir. 2003) (citations omitted) (alteration in original). The question we confront in this case, however, is not whether two companies engaged in run-of-the-mill price fixing. Instead, the defendants have asked us to find an exception to the *per se* prohibition on price-fixing where two entities have established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands. In doing so, the companies fixed the prices of those two brands of gasoline, Texaco and Shell, by agreeing *ex ante* to charge the exact same price for each. We think the exception the defendants seek is inconsistent with the Sherman Act as it has been understood to date.

The Sherman Antitrust Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations[.]" 15 U.S.C. § 1. The Supreme Court has declined to read this language literally. *See Nat'l Soc'y of Prof'l Engineers v. United States,* 435 U.S. 679, 687, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (noting that § 1 of the Sherman Act "cannot mean what it says"). Instead, the Court has created a two-tiered mode of analysis.

> In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality--they are "illegal *per se.*" In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the

> purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Prof'l Engineers, 435 U.S. at 692, 98 S.Ct. 1355. All parties agree that the relevant question in this case is whether the defendants' conduct falls under the first category of analysis.[7]

If the plaintiffs can establish that the defendants' conduct falls within the range of conduct considered illegal *per se,* it does not matter whether the particular application of the *per se* rule appears inefficient or unfair. As the Court has explained,

> The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of per se rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a

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[7] The plaintiffs have also suggested that if we reject their *per se* approach, we should employ the "quick look" theory of review to find defendants liable. Quick look analysis applies when *per se* review is inapplicable but when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anti-competitive effect on customers and markets." *California Dental Ass'n v. Federal Trade Commission,* 526 U.S. 756, 770, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999). As the district court rightly noted, "[m]uch like per se treatment, quick-look analysis applies 'when the great likelihood of anticompetitive effects can easily be ascertained.'" (quoting *California Dental,* 526 U.S. at 770, 119 S.Ct. 1604). Because we hold that the plaintiffs have made a sufficient showing with respect to the illegality of the alliance's price fixing system under the *per se* rule, we need not decide whether that scheme would survive "quick look" review.

> conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.

Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343-44, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) (citations omitted).[8] The Court has held consistently that the injustice of the rule's broad and uniform application must be addressed to Congress, not the judiciary. *See Prof'l Engineers,* 435 U.S. at 692, 98 S.Ct. 1355.

Price fixing is the quintessential example of a *per se* violation of § 1. Numerous cases support this basic principle. *See Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 433, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) (explaining that there is a *per se* rule against price fixing having the "same force and effect as any other statutory commands"); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents,* 468 U.S. 85, 107-08, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.") (citation omitted) (hereinafter: *NCAA*); *Maricopa County,* 457 U.S. at 351, 102 S.Ct. 2466 ("The anticompetitive potential inherent in *all* price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those

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[8] The *Maricopa* Court noted in a footnote that price fixing is "[a]mong the practices which the courts have heretofore deemed to be unlawful in and of themselves." *Id.* at 344 n. 15, 102 S.Ct. 2466 (quoting *Northern Pac. R. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)) (parallel citation omitted).

claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application."); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980) ("It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable.") (citations omitted); *Prof'l Engineers,* 435 U.S. at 692, 98 S.Ct. 1355 (noting that "[p]rice is the 'central nervous system of the economy'" and holding that "an agreement that 'interferes with the setting of price by free market forces' is illegal on its face") (citation and alteration omitted).

Notwithstanding the above, it is plain that § 1's blanket prohibition on price fixing, like the Act itself, cannot be read literally. *Cf. Prof'l Engineers,* 435 U.S. at 687, 98 S.Ct. 1355 (§ 1 of the Sherman Act "cannot mean what it says"). There are *some* price fixing arrangements that violate the letter of the Sherman Act but are legal nonetheless. For instance, when two competing companies agree to merge and to combine their product lines, or to eliminate the old product lines and create an entirely new one, they generally agree to adopt a uniform pricing scheme. The Supreme Court has permitted such arrangements. In addition, in *Maricopa County,* the Supreme Court noted in dicta that in joint ventures where "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit," the ventures are considered, for some purposes at least, to be "single firm[s] competing with other sellers in the market." 457 U.S. at 356, 102 S.Ct. 2466; *see also Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 9, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act.") (hereinafter: *BMI*) (citation omitted).

APPENDIX A

It is not the case, however, that the mere existence of a bona fide joint venture means that participating companies may use the enterprises to do anything they please with full immunity from *per se* analysis under § 1, including price fixing. As the district court correctly stated when ruling on the motion to dismiss, the issue with respect to legitimate joint ventures is whether the price fixing is "naked" (in which case the restraint is illegal) or "ancillary" (in which case it is not). *Accord* XI HOVENKAMP ¶ 1908, at 228-30 (arguing that "a restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful" and that "a restraint is not saved from the 'naked' classification simply because it is included in some larger joint venture arrangement that is clearly efficient"). For instance, if in reliance on the existence of a valid joint venture between Coca Cola and Pepsi designed to research new types of soda flavors, the two companies imposed a price floor on all soda sold nationwide, the price fixing would constitute an illegal "naked restraint on trade." Along these lines, the Supreme Court has recognized that even joint ventures that are lawful in their general operations may violate the Sherman Act when they engage in specific anticompetitive conduct. *See NCAA,* 468 U.S. at 110, 104 S.Ct. 2948 (holding that an agreement among NCAA schools restricting the broadcasting of football games was an invalid "naked restraint on price and output" but not questioning the validity of the association itself); *BMI,* 441 U.S. at 23, 99 S.Ct. 1551 (holding that joint ventures are not "*usually* unlawful, at least not ... where the agreement on price is *necessary* to market the product at all") (emphasis added); *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) ("The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws.... [A]greements between legally separate persons and companies to suppress competition among

themselves and others [cannot] be justified by labeling the project a 'joint venture.'") (citation omitted); *see also* XI HOVENKAMP ¶ 1908, at 228-29 (1998) (noting that the Supreme Court has often condemned joint ventures' price- or output-fixing provisions while leaving "the balance of the joint venture intact").

The defendants' argument to the contrary--that joint ventures such as Equilon and Motiva are incapable of violating the Sherman Act--ignores the lesson of *Citizen Publishing Co. v. United States,* 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969), as well as that of *NCAA, BMI,* and *Timken.* In *Citizen Publishing,* the Supreme Court confronted a joint venture similar to the one between Equilon and Motiva. The defendants in that case were the two daily newspapers in Tucson, Arizona. They entered into a joint venture agreement, which "provided that each paper should retain its own news and editorial departments, as well as its corporate identity." 394 U.S. at 133, 89 S.Ct. 927. The joint venture established a new company, Tucson Newspapers, Inc., "which was to manage all departments of their business except the news and editorial units. The production and distribution equipment of each paper was transferred to TNI." *Id.* at 133-34, 89 S.Ct. 927. The purpose of the agreement, like the purpose of the Alliance, was "to end any business or commercial competition between the two papers." *Id.* at 134, 89 S.Ct. 927.[9]

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[9] Also similar to the agreements forming Equilon and Motiva, the *Citizen Publishing* agreement imposed several anticompetitive controls: first, the joint venture consolidated pricing and set joint subscription and advertising rates; second, the venture pooled all profits and losses pursuant "to an agreed ratio"; and third, the two parent corporations agreed not to compete against each other or the joint venture in the relevant market areas. *Id.*

APPENDIX A

The Supreme Court held that the confluence of these anticompetitive restraints, in the context of a joint venture between two formerly-vigorous competitors in the market area targeted by the venture, constituted a *per se* violation of the Sherman Act.

> The § 1 violations are plain beyond peradventure. Price-fixing is illegal per se. Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act. The agreement not to engage in any other publishing business in Pima County was a division of fields also banned by the Act. The joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field.

Id. at 135, 89 S.Ct. 927 (internal citations omitted). Cases like *Maricopa County* and *BMI* do seem to suggest that the Court, if confronted with a similar joint venture today, might not find the enterprise as a whole unlawful. The Court has, however, continued to enforce the Sherman Act's *per se* prohibition on price fixing, and has scrutinized joint ventures to ensure that they do not contain "naked" restraints on trade. *See, e.g., NCAA,* 468 U.S. at 109, 104 S.Ct. 2948. Nothing in the cases suggests that the Court would overrule *Citizen Publishing* in its entirety, abandon its holding that the price fixing in which the joint venture engaged was illegal *per se,* or eliminate the rule that "naked" price-fixing by a joint venture violates the Sherman Act.

The district court distinguished *Citizen Publishing* in three ways. Each is unsatisfactory. First, the court found that the Tucson newspapers in *Citizen Publishing* effectively eliminated "all competition," whereas Equilon and Motiva

"continue to compete with several major oil companies in their relevant markets." This distinction runs contrary to Supreme Court precedent. *See Fed. Trade Comm'n*, 493 U.S. at 434, 436, 110 S.Ct. 768 (noting that even "a small conspirator may be able to impede competition" and holding that "[c]onspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already disclosed by this record, to warrant condemnation under the antitrust laws").[10]

Second, the district court found that the *Citizen Publishing* newspapers "combined for the specific purpose of restricting competition and fixing prices," in contrast to a complete lack of evidence establishing such intent for the alliance ventures. That distinction, if true, would speak only to the validity of Equilon and Motiva as a whole-it would not justify the defendants' adoption of a price fixing scheme. Moreover, the court's finding was contrary to its obligation to accept the version of disputed facts most favorable to the plaintiffs. Several of the defendants' witnesses admitted during depositions that the decision to unify the pricing of the Texaco and Shell brands was made contemporaneously with the formation of the alliance, but before the actual joint ventures officially existed, and that the very purpose of the alliance was to eliminate competition in order to realize efficiency gains and gain market share.[11] The plaintiffs

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[10] *See also NCAA*, 468 U.S. at 109-10, 104 S.Ct. 2948 ("As a matter of law, the absence of proof of market power does not justify a naked restraint on price or output.... This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.").

[11] Thus, contrary to our dissenting colleague's understanding, the pricing decision was not made by a single economic entity. *See* Post, at 1126, *id.* at 1127 ("[N]othing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline

created a sufficient issue of material fact as to whether the intended purpose of the unified pricing scheme was to restrict competition.

Third, the district court believed that the only reason the non-competition agreement in *Citizen Publishing* was unlawful was because the agreement joined the only two competitors in the market. The Western oil market, by contrast, is a diverse market with "several competitors," while the Equilon joint venture has a much narrower non-competion agreement. This distinction returns to an analysis of market power, an analysis which the Supreme Court has held is inappropriate in this type of case. *See Federal Trade Comm'n*, 493 U.S. at 434-35, 110 S.Ct. 768; *NCAA*, 468 U.S. at 110, 104 S.Ct. 2948 ("We have never required proof of market power in such a case."). Moreover, the record shows both that Equilon exercised a substantial amount of control over the Western gasoline market, and that the two joint ventures helped divide the gasoline consumer field by jointly promoting and targeting the Texaco and Shell brands to better capture their relevant markets. None of the district court's distinctions is sufficient to justify ignoring *Citizen Publishing* and that decision's condemnation of price fixing by former

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business, also prices its own products. It decided to price them the same, as any other entity could."). At this stage of the litigation, we are required to draw all reasonable inferences in favor of the plaintiffs. Viewing the evidence in that light, there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance. The decision by Texaco and Shell to include in their joint ventures a unified pricing scheme was not a decision made by a single economic entity-it was a decision made by competitors. Whether the agreement constituted "a conspiracy [ ] in restraint of trade," 15 U.S.C. § 1, or whether such a conspiracy would exist regardless of when the decision to engage in unified pricing was made, is for the district court to determine on remand.

competitors even when adopted as part of a joint venture arrangement.

In granting the defendants' summary judgment motion, the district court ruled that "a reasonable trier of fact could not find that the Defendants formed Equilon and Motiva merely to achieve an ulterior anticompetitive purpose or that the ventures are patently anticompetitive."[12] Even were that true, the district court stopped short of completing the requisite inquiry. The proper inquiry for a *per se* analysis of price fixing is not simply whether the joint venture itself is anticompetitive. Nor is the relevant question simply whether the defendants intended to destroy competition. *See Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1153-54 (9th Cir. 2003) (holding that evidence of an intent to destroy competition or engage in predatory price controls is not essential to demonstrating the existence of an illegal agreement). Rather, if the answer to those questions is in the negative, we must then decide whether the defendants' conduct--setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors[13]--is reasonably necessary to further the legitimate aims of the joint venture. *See Freeman*, 322 F.3d at 1151 (holding that plainly anticompetitive conduct by otherwise valid joint ventures must be "reasonably ancillary to the legitimate cooperative aspects of the venture") (citation omitted).

The Supreme Court has upheld joint ventures and other corporate combinations involving fixed prices, but generally

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[12] The district court asked whether "Equilon and Motiva are either mere window-dressings for a price fixing conspiracy or ... are otherwise patently anticompetitive."

[13] We assume that normal market factors would include the cost of production and marketing, supply, demand, and the like.

has done so only when it appeared plain to the Court that the restraints undertaken by the joint ventures were "necessary" to the legitimate aims of the joint venture. *See BMI,* 441 U.S. at 23, 99 S.Ct. 1551 (approving an otherwise invalid price restraint only because "the agreement on price is necessary to market the product at all"); *NCAA,* 468 U.S. at 117, 104 S.Ct. 2948 ("Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved."); *id.* at 101, 104 S.Ct. 2948 ("what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"); *accord* XI HOVENKAMP ¶ 1908, at 236 ("Joint sales endeavors may require joint price setting, particularly when the jointly produced product, such as the 'blanket' license in *BMI,* is something individual participants could not produce at all."). Courts have engaged in this "essentiality query," *id.* at 228, in order to ensure that a joint venture has a legitimate justification--other than the desire to enhance profits and market control--for adopting a particular restraint that would otherwise violate the Sherman Act. Thus, whether the *per se* rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded.[14]

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[14] As one commentator has explained,

> Once a court finds the joint venture proper, it can easily determine the appropriateness of any related competitive restraints among the parties to the venture. A court should simply consider whether such restraints are necessary to promote the venture's procompetitive purposes. If a joint venture itself is procompetitive, the courts should uphold

APPENDIX A

In considering the relationship of the enterprise's pricing actions to the venture's legitimate objectives, we find it significant that the defendants here did not simply consolidate the pricing decisions within the joint ventures--they *unified* the pricing of the two brands from the time the alliance was formed by designating one individual in each joint venture to set a single price for both brands.[15] Normally, a business determines the prices it will charge for its various products by considering numerous factors, just a few of which include the costs of production and marketing and the contours of the relevant product markets. In this case, the defendants have stressed that, in addition to the differences in the product themselves, the gasolines marketed under the Texaco and Shell labels have different reputations and consumer bases. It thus seems likely that independent price analyses would result, at least in some circumstances, in the rational decision to sell the different brands at different prices. Instead, the defendants chose to fix those prices uniformly.

The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies.

> any restrictions on competition necessary to achieve its legitimate purposes.... The defendant should have the burden of proving that a competitive restraint is required to further a venture's efficiency objectives. If a defendant fails to meet this burden, a court should preclude the restraint without any further inquiry.

Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors,* 86 Iowa L.Rev. 1137, 1188-89 (2001).

[15] As stated earlier, this single price was subject to variations depending upon geographic markets, such that the price of the Texaco and Shell brands might be higher in San Diego, California than it was in Lincoln, Nebraska. The two brands, however, were always priced together in each geographic market--the price never varied as between the two.

APPENDIX A

Nor does the record contain facts sufficient to warrant our drawing any such inference. To the contrary, the record before us reveals that the alliance never considered unified pricing to be relevant to product improvement or efficiency gains. As one oil company executive explained, all of the anticipated cost savings, which were calculated prior to formation of the joint ventures, had "nothing to do with pricing." The absence of persuasive evidence showing a procompetitive justification for initiating the price-fixing scheme, when viewed along with the plaintiffs' evidence showing anticompetitive effects, convinces us that the plaintiffs have made a sufficient showing as to the applicability of the *per se* rule.[16]

The defendants offer only two justifications for the unitary pricing scheme. First, the defendants argue--as does our dissenting colleague--that, as a general rule, any bona fide joint venture must be able to set prices for its products at whatever level it chooses: "without the ability to price its products, neither venture would have had the authority to make fundamental decisions affecting its financial performance." Appellees' Brief, at 16. Second, the defendants argue that Equilon and Motiva fixed uniform Texaco and Shell prices in order to "prevent issues of price discrimination from arising under the Robinson Patman Act[.]" *Id.* We address the latter justification first.

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[16] Indeed, the record is close to establishing that the price-fixing scheme was sufficiently unrelated to accomplishing the legitimate objectives of the joint venture as to justify granting the plaintiffs' motion for summary judgment. However, given the complexity of the economic arrangements at issue, the sparseness of the record, the district court's failure to apply the appropriate test, and our general presumption against granting summary judgment in such cases, we conclude that the denial of both sides' motion for summary judgment is appropriate here.

APPENDIX A

A cursory examination of the Robinson-Patman Act, 15 U.S.C. § 13,[17] which was designed to prevent sellers from engaging in price discrimination, reveals its inapplicability here. Under Robinson Patman, sellers may not sell the same product at different prices on the basis of the identity of the buyer.[18] But in adopting the Act, "Congress did not intend to outlaw price differences that result from or further the forces of competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993). Robinson Patman was aimed at evils entirely absent here. As another Circuit has explained,

> The [Act] was ... motivated by concerns for small, independent distributors, which in the 1930's were threatened by the arrival of chain stores. It marked "the high-water mark of the anti-chain-store movement." Although the Clayton Act had prohibited certain price discriminations, it was seen as ineffective in stopping the discriminatory prices granted chain stores by virtue of their size. So far as purchasing was concerned, this discrimination put the more normal "mom and pop" merchants of the day at a competitive disadvantage. Congress [enacted Robinson-Patman] to alleviate the disadvantage by putting the new age retailing behemoths on a level

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[17] The Act provides that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality[.]" 15 U.S.C. § 13(a).

[18] The Act explicitly excludes price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered[.]" 15 U.S.C. § 13(a).

APPENDIX A

> "playing-field" with small independent merchants and businessmen....
>
> As is obvious from this brief summary of the RPA's history, "it is fairness, as Congress perceives it, that Robinson Patman is all about." The Act's goal is to abolish unwarranted favoritism among all functional competitors, big or small. Its objective is to assure "that businessmen at the same functional level start on equal competitive footing so far as price is concerned"; "to assure that all sellers regardless of size, competing directly for the same customers ... receive evenhanded treatment from their suppliers" ....

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1422 (11th Cir. 1990) (internal citations, alterations, and footnote omitted).

The quoted passage makes it clear that the defendants' Robinson Patman argument is wholly without merit. The Act would unquestionably be inapplicable to a decision by the defendants to sell the distinct Texaco and Shell brands of gasoline at different prices. Any such decision would necessarily be predicated on the differences between the two brands, not upon the identity of the buyers. The record shows that the alliance never intended to market or sell the two brands as the same product. Rather, it went to great lengths to differentiate carefully between the brands. Mostly, this took place at the additive stage--where generic "fungible" gasoline is transformed into a specific brand. But it also took place at the marketing stage, where the Texaco and Shell brands of gasoline were always targeted at different groups of consumers. The defendants cite no precedent or provision of statutory law that would support applying Robinson Patman to a decision to use different prices for distinct, though

similar, products. Finally, this Circuit has rejected "the argument relying on the 'underlying notion of fairness of offering the same services at the same prices to all participants.' The 'fairness' of uniform pricing is not a relevant consideration in an antitrust case; consumers are presumed to prefer lower prices to the satisfaction of knowing they paid the same inflated price as everyone else." *Freeman,* 322 F.3d at 1151.

The first of the defendants' two arguments--that a joint venture must be able to set whatever price it chooses for its products--proves too much. If that were true, any number of companies could create joint ventures as fronts for price-fixing. The simple answer is that the Supreme Court has declined to immunize joint ventures from *per se* antitrust scrutiny. *See NCAA,* 468 U.S. at 109, 104 S.Ct. 2948; *BMI,* 441 U.S. at 23, 99 S.Ct. 1551; *Citizen Publishing,* 394 U.S. at 135, 89 S.Ct. 927; *Timken,* 341 U.S. at 598, 71 S.Ct. 971. We too have rejected the plaintiffs' proposed rule. *See Freeman,* 322 F.3d at 1148 (holding that the fact that joint ventures "pursue the common interests of the whole" does not necessarily immunize them from antitrust scrutiny and noting that "cases finding joint ventures to be incapable of conspiracy are the 'exception'"). The leading treatise in the field has also expressed similar disapproval of the defendants' claim. *See* XI HOVENKAMP ¶ 1908, at 229 ("Such a rule could protect cartels from the heightened scrutiny attending naked restraints through the simple device of attaching the cartel agreement to some other, independently lawful transaction.").

Finally, the defendants claim--as does our dissenting colleague--that an application of the *per se* rule here would mean that joint ventures could not set prices for their products. We reject this argument. We of course recognize that joint ventures may price their products; that is not the question. The question is whether two former (and

potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands. We have held that the Sherman Act's *per se* rule applies when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture--a relationship that justifies the otherwise prohibited price restraints. Thus far in this litigation, the defendants have failed to produce sufficient evidence demonstrating that their price fixing scheme was ancillary rather than naked and, thus, that they are entitled to summary judgment.

The result we reach here allows joint ventures to set prices for their products within the limits of the Sherman Act. Our analysis would be different if we confronted a joint venture in which former competitors agreed jointly to research, produce, market, and sell a new product, or a joint venture in which competitors agreed to merge their current product lines into one collective brand. Nor would we necessarily reach the same result if the defendants had independently decided to charge the same price for Texaco and Shell gasoline after conducting separate price analyses for each brand, or had they come forward with persuasive evidence that the setting of a single, fixed price was important to accomplishing the legitimate aims of the joint ventures.

We do not share the defendants' concern that validating the application of the *per se* rule to the pricing decisions of joint ventures will risk invalidating countless economically efficient business integrations. The plaintiffs have come forward with sufficient evidence to create a triable issue of fact as to whether the defendants engaged in a naked restraint on trade, prohibited *per se* by the Sherman Act. Whether the defendants will be found liable at trial remains to be seen. But if they are, and if that individual application of the *per se*

rule is economically inefficient, that concern must be addressed to Congress, not the judiciary. *See Maricopa County,* 457 U.S. at 354-55, 102 S.Ct. 2466; *Professional Engineers,* 435 U.S. at 692, 98 S.Ct. 1355.[19]

We therefore hold that the district court erred in finding no triable issue of fact with respect to the plaintiffs' *per se* claim. The plaintiffs have presented sufficient evidence to create a triable issue of fact as to whether the alliance's unified pricing scheme was a *per se* violation of § 1 of the Sherman Act.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's award of summary judgment to defendant Saudi Refining, Inc., REVERSE the district court's award of summary judgment against the Plaintiffs Appellants, and

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[19] Congress's response to *Citizen Publishing* further convinces us that we should not carve out an exception to the Sherman Act simply because the type of venture at issue here may be economically efficient. Shortly after the decision, Congress passed the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804, which specifically exempted from the Sherman Act newspaper operating arrangements like the one in *Citizen Publishing. See Hawaii Newspaper Agency v. Bronster,* 103 F.3d 742, 744- 45 (9th. Cir. 1996). After surveying the relevant "economic conditions," Congress determined that the specific type of joint venture at issue was beneficial and even necessary in a "large majority of American communities." H.R.Rep. No. 91-1193, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3547, 3548. Those economic conditions, in Congress's view, justified more lenient antitrust review of newspaper industry joint ventures than the Court had applied in *Citizen Publishing.* Congress has made no such findings, nor has it passed any similar law, relevant to the oil and gasoline industry, which certainly is not without its supporters in the Legislative and Executive Branch. If Congress wishes to exempt oil and gasoline enterprises from the Sherman Act's *per se* prohibition of price fixing, it may certainly do so, but it is beyond our authority to read new exceptions into the Act.

APPENDIX A

REMAND for further proceedings consistent with this opinion.

APPENDIX A

FERNANDEZ, Circuit Judge, Concurring and Dissenting:

I agree that the plaintiffs lacked standing as to SRI and, therefore, concur in the result of part III of the majority opinion. However, I dissent from part IV.

While this case does involve a very complicated set of transactions, it presents a rather straightforward antitrust law question. That is, where former competitors create a bona fide joint venture to which all of their assets and operations in segments of their businesses are contributed, will there be a *per se* violation of the antitrust laws, if the joint venture entity sets the prices of the goods it sells? I think the answer is no.

Here, Shell and Texaco formed Equilon Enterprises, LLC in the western United States, and Motiva Enterprises, LLC in the eastern United States.[1] There can be no doubt that each of the new entities is a true, bona fide, economically integrated joint venture. Refineries, lubricant plants, research laboratories, thousands of service stations, thousands of miles of pipeline, thousands of employees, and over 100 terminals were contributed to the ventures. Upon those transfers, Shell and Texaco ceased refining and marketing operations in both the western and the eastern United States. They were no longer in those businesses within the United States; the joint ventures were.[2] In other words, Equilon now manufactured, inventoried, transported, and marketed the products. It ran

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[1] Henceforth, I shall only refer to Equilon because it is the entity that directly affects plaintiffs in this case-Independent Operators.

[2] We have previously had occasion to describe the nature of Equilon. *See Abrahim & Sons Enters. v. Equilon Enters., LLC*, 292 F.3d 958, 960 (9th Cir. 2002). As we stated, an LLC is an entity truly distinct from its members and its acts "are deemed independent of the acts of its members." *Id.* at 962. It is a separate juridical person. *Id.* LLCs are much like corporations, and, though controlled by their members, "LLCs remain separate and distinct from their members." *Id.*

the refinery; it had the research facilities; it transported products; and it dealt with the station operators and other buyers. It also priced the products, and set the same price for *its* Shell and Texaco brands.

While Independent Operators do not assert that the placing of the whole manufacturing, transport and marketing functions in a single entity violated 15 U.S.C. § 1, they do assert that having the pricing function in Equilon did violate the antitrust laws *per se*. The majority thinks that might be true; I do not.

It is plain enough that the mere creation of a joint venture is not a *per se* antitrust violation. No doubt, like mergers, joint ventures are combinations of business assets but "such combinations are judged under a rule of reason" analysis. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984). Especially should that be true of the LLC type of venture, which is not only a separate entity, but which also functions as a separate economic unit for all practical purposes. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1053 (9th Cir. 1983). In fact, to slightly paraphrase the Supreme Court statement in *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356, 102 S.Ct. 2466, 2479, 73 L.Ed.2d 48 (1982):

> [Equilon is] ... analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market.

Nor does the mere fact that Equilon sets prices for the products it manufactures and sells suffice to demonstrate that its actions were price fixing for antitrust purposes. *See*

APPENDIX A

Broad. Music, Inc., v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8-9, 99 S.Ct. 1551, 1556-57, 60 L.Ed.2d 1 (1979). Rather, "[l]iteralness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* at 9, 99 S.Ct. at 1557. So just what could make the operation of Equilon a *per se* violation of the antitrust laws? Surely it is not a claim that the venture is a sham. *See Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1st Cir. 1998). No one seriously asserts *that.*

Nor can it be that this is a case like *Citizen Publ'g Co. v. United States,* 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969). There, two newspapers formed a third corporation for the principal purpose of eliminating competition, but each remained in the same business in the same area, and retained the production of the true product--news and editorials--in its own hands. *Id.* at 133, 89 S.Ct. at 928. Moreover, the newspapers themselves--not the new entity--jointly set the subscription and advertising rates. *Id.* at 134, 89 S.Ct. at 928. None of that is true here. Equilon owned all of the assets, all of the obligations, and, in a word, the whole business. It set the prices. It was a separate entity; a fact that the Independent Operators seem unable or unwilling to grasp.

But, Independent Operators argue, in this case the fixing of prices by the venture is neither essential nor "reasonably ancillary to the legitimate cooperative aspects of the venture." *Freeman v. San Diego Ass'n of Realtors,* 322 F.3d 1133, 1151 (9th Cir. 2003). The majority agrees; I cannot understand why. The situation here is far from the kind of situation we faced in *Freeman.* There, the reason for the venture was the unifying of disparate multiple listing databases. *Id.* at 1140-41. That done, there was a new database entity, and the corporations that formed it for that purpose went on operating their own businesses. But they all also agreed to fix a price for support services. That was essentially unrelated to the

database itself, and was unnecessary, and unjustified. *Id.* at 1151. It was the latter "price fix" that ran afoul of antitrust principles. Here we have nothing of the kind.

In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services? I am at a loss for an answer to that question, and nothing written about this case to date imparts additional wisdom or better information.

Yet Independent Operators insist that the setting of the prices is a violation. That is, separate juridical business entity though it is, Equilon can really only be the semblance of a true business, for if it, like any other economic actor, desires to price its own goods, its members may well be subject not merely to commendation, but to outright denunciation by the courts as *per se* violators of the antitrust laws. It means that this entity must ask a separate juridical entity-for example, Shell, which does not itself own any of the facilities or products-to decide what price should be charged by Equilon.[3] Again, the majority thinks that might be so; I do not.

We now have an exotic beast, no less strange than a manticore, roaming the business world. This beast would otherwise be a true business, but when it acts like a true business--sets prices for its own goods--it subjects its otherwise insulated members to the severe sting of antitrust liability. While it has the head of a business man and the

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[3] Shell, by the way, is a mere member of Equilon and is shielded from liability for the debts or obligations of Equilon, just as corporate shareholders are shielded. *See* Cal. Corp. Code § 17101.

body of an entrepreneurial lion, it has the tail of a liability scorpion. I suppose I am as taken with stories of exotic beasts as the next person, but I prefer to leave them in the realm of the unknown; I would rather not confront them in the marketplace.

In short, I do not believe that the Independent Operators have pointed to a *per se* antitrust violation,[4] and they do not even attempt to assert a full rule of reason claim.

Thus, I respectfully dissent as to part IV of the majority opinion.

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[4] Similarly, no "quick look" violation is shown. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770, 119 S.Ct. 1604, 1612, 143 L.Ed.2d 935 (1999); *Bogan v. Hodgkins*, 166 F.3d 509, 514 n. 6 (2d Cir. 1999).

APPENDIX B

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AUGUST 13, 2002

No. CV 99-6114-GHK (JWJx)

FOUAD N. DAGHER, ET AL.,

v.

SAUDI REFINING, INC., ET AL.

August 13, 2002

MEMORANDUM AND ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. Introduction

This matter is before the court on the parties' cross-motions for summary judgment. The motions came on regularly for hearing on December 10, 2001. On May 21, 2002, we issued an order with respect to Plaintiffs' standing against SRI. We hereby adopt Sections II (Procedural History), III (Undisputed Facts), IV (Summary Judgment), and V.A (Antitrust Conspiracy Cases) of that May 21, 2002 order. We now rule on the remaining issues after considering the joint briefs all pertinent papers, the evidence, and oral argument:

II. Per se and/or Quick-Look Antitrust Liability

The parties divide per se and/or quick-look liability into two subissues: (1) "Are Equilon and Motiva integrated such that SRI, Shell and Texaco are not subject to per se or "quick look" liability?" (2) "Are Equilon's and Motiva's claimed

efficiencies sufficient such that SRI, Shell and Texaco are not subject to per se or quick look liability?" Joint Argument at i.

The parties appear to have borrowed this formulation from language in our Rule 12(b)(6) order. At that stage, we accepted Plaintiffs' allegations are true and identified any possible factual basis for § 1 per se or quick-look liability. That categorical framework is not as helpful at the summary judgment stage. We can now analyze the relevant legal principles in the context of a significant body of evidence.

In light of the admitted cost savings and significant commitment of resources into what appear to be legitimate joint ventures, Joint Fact ¶¶ 39, 48, we address two ultimate questions: (1) whether a reasonable trier of fact could conclude that Equilon and Motiva are either mere window-dressings for a price fixing conspiracy or (2) whether they are otherwise patently anticompetitive.

Since Plaintiffs waived any reliance on the rule of reason, we will not weigh all of the claimed benefits and purported anticompetitive effects to determine if the anticompetitive effects predominate. *See, e.g., Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 947 (9th Cir. 2000); *Tanka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (describing shifting burdens under rule of reason). The question is not whether Defendants violated § 1, but whether their conduct falls under the exceptional § 1 per se or quick-look doctrines. Moreover, Plaintiffs abandoned the per se or quick-look theory of market division.

A. Per se Analysis

To establish per se liability, Plaintiffs must do more than prove that Equilon and Motiva "more likely than not" affected competition negatively. *Am. Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 787 (9th Cir. 1996). The "per se approach can only be applied to an agreement which 'facially

appears to be one that would almost always tend to restrict competition and decrease output.'" *Id.* (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984)); *See also Eichorn v. AT&T Corp.*, 248 F.3d 131, 138 (3d Cir. 2001) ("[O]n its face, [it] has 'no purpose except stifling competition.'"). Stated another way, if the conduct "does not invariably have anticompetitive effects," we will not condemn it under a per se analysis. *United States v. United States Bypsum Co.*, 438 U.s. 422, 441 & n.16; *see also* 1 Von Kalinowski et al., Antitrust Laws and Trade Regulation § 13.04, at 13-21 (2d ed. 1996).

For example, true price fixing is so "plainly anticompetitive," and so lacking in "any redeeming virtue," that we automatically condemn such arrangements as presumptively unreasonable. *BMI v. CBS*, 441 U.S. 1, 8 (1979); *NCAA*, 468 U.S. at 100; *see also Eichorn*, 248 F.3d at 142-43. Courts have repeatedly treated horizontal price fixing among competitors as per se violations. *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1011 (9th Cir. 1999).

However, the concept of "price fixing" cannot be applied literally. *BMI*, 441 U.S. at 9. Price fixing "will often, but not always, be a simple matter." *Id.* "When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act." *Id.* Efficient joint ventures often entail agreements on prices and output as well as restrictions on competition, yet do not violate the prohibition against price fixing. *See* XI Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ("Hovenkamp") ¶ 1908, at 229-30 (1998).

If an agreement arguably promotes efficiency or productivity at the time adopted, we should apply the rule of reason and perform a more discriminating assessment. *Polk*

APPENDIX B

Bros., Inc. v Forest City Enters., 776 F.2d 185, 189 (7th Cir. 1985). For example, competitors should be free to combine resources to create products that each could not develop alone. *See BMI*, 441 U.S. at 23. The joint operation may administratively require former competitors to set a single price, but this does not indicate a naked price fixing restraint. The price fixing is "merely ancillary to the main purpose" of producing the new product. *See id.*

Thus, the per se rule is less likely to apply when an agreement to set prices or impose some other restraint is part of a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Ariz. v. Maricopa County Med. Soc'y*, 457 U.s. 332, 356-57 (1982); *see also Cooperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (noting joint ventures are usually subject to rule of reason analysis since they unlock potential efficiencies); *Addamax Corp. v. Open Software Distrib.*, 152 F.3d 48, 52 (1st Cir. 1998) ("Joint venture enterprises . . . unless they amount to complete shams, are rarely susceptible to per se treatment."); XIII Hovenkamp ¶2100g, at 14 ("In our relatively open market system we begin with the premise that joint productive activity is socially valuable and it is not antitrust's job to 'approve' joint ventures.").

Because per se violations settle the question of liability without any inquiry into anticompetitive impact, the Supreme Court has cautioned against expanding the per se rule to new business arrangements with which we have little experience. *State Oil Co. v. Khan*, 552 U.s. 3, 10 (1997) (citing *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 477, 458-59 (1986)). "Where the conduct at issue is not garden-variety . . ., we have eschewed a per se rule and instead have utilized a rule of reason analysis." *Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 844 (9th Cir. 1996); *see also Am. Ad Mgmt.*, 92 F.3d at 784. As a result, when conduct falls outside typical

per se categories of "horizontal price fixing, division of markets, group boycotts, tying arrangements, and output limitations," we generally apply a rule of reason analysis. *See Am. Ad Mgmt.*, 92 F.3d at 784; *Big Bear Lodging Ass'n*, 182 F.3d at 1011.

B. Quick-Look Analysis

Conduct outside the narrow per se categories can be condemned short of a full rule of reason analysis if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Much like per se treatment, quick-look analysis applies "when the great likelihood of anticompetitive effects can easily be ascertained." *Id.* Our experience with such combinations must be so clear that we can confidently conclude the principal result will be anticompetitive. *Id.* at 781. If the potential anticompetitive effects are "far from intuitively obvious," we resort to a complete rule of reason analysis. *Id.* at 759.

C. Initial Assessment of Evidence[1]

Several undisputed facts appear to foreclose the conclusion that Equilon and Motiva are nothing but window-dressings for an old-fashioned price fixing cartel or are otherwise patently anticompetitive. Though the parties dispute the exact extent of integration, both ventures control significant refining and marketing assets. See Joint Facts ¶ 48. Both entail risk sharing based on the Defendants' respective capital investments. Id. ¶¶ 43, 47; *see also Maricopa County*, 457

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[1] The parties address per se and quick-look together in their analysis. We do the same to avoid needless repetition and because the principles are substantially similar. *See Cal. Dental. Ass'n*, 526 U.S. at 779.

U.S. at 356-57. Both have in fact achieved cost savings, Pls.' Facts ¶¶ 39-41, and each manufactures and markets branded gasoline. Joint Facts ¶¶ 10, 42, 45, 53. In other words, Equilon and Motiva have achieved their parents' stated goals. On its face then, the undisputed evidence shows potential and realized efficiencies occurring within functioning and integrated enterprises.

Plaintiffs contend that every combination, whether efficient or anticompetitive, realizes cost savings from "closing offices, eliminating positions, and avoiding capital expenditures . . . ." Joint Argument at 25-26. Plaintiffs argue that Defendants cannot avoid per se or quick-look liability by identifying cost savings alone. However, businesses regularly combine resources to realize cost savings through elimination of redundant workers, capital, and overhead expenses. *See, e.g.*, Fed. Trade Comm'n and U.S. Dep't of Justice, 1992 Horizontal Merger Guidelines § 4 (revised April 8, 1997); XIII Hovenkamp ¶ 2100, at 4, ¶ 2121b, at 117. So long as the newly formed business maintains a comparable level of production, it makes more efficient use of the remaining resources. Here, we have no evidence that Defendants decreased their overall level of production after forming Equilon and Motiva.

In any event, the undisputed evidence shows that Defendants anticipated operating efficiencies beyond cost savings alone. Defendants predicted that Equilon and Motiva would benefit from greater economies of scale. *See, e.g.*, Vol. 2, Tab 3 at 35; Vol. 3, Tab 25 at 820-21. The physical proximity of some refineries meant Defendants could improve overall efficiency through, among other things, the sharing of inputs and transportation costs. *See, e.g.*, Defs.' Vol. 1, Tab 11 at 242, Tab 12 at 280; Vol. 2, Tab 19 at 454; Vol. 3, Tab 25 at 819, 844. Defendants also expected to tap into the capacity of previously unused pipelines, simultaneously eliminating the need to rely on third-party

carriers. *See, e.g.*, Defs.' Vol. 3, Tab 25 at 854, Tab 35 at 1205. Though in some instances Defendants expected to close refineries, those refineries were operating well below capacity, allowing Defendants to increase the efficiency of the remaining ones. *See, e.g.*, Tab 25 at 843, Tab 29 at 971.

In addition to improved use of physical resources, Defendants anticipated economic benefits from an expanded knowledge base. They anticipated reductions in the number of plant failures from exchanges regarding best practices. *See, e.g.*, Defs.' Vol. 3, Tab 25 at 791, 822-23. Defendants also could share knowledge and technologies acquired through research and development programs. *See, e.g.*, *id.* at 809. Consequently, the claimed savings from forming Equilon and Motiva did not relate solely to the elimination of redundant costs.

Plaintiffs next argue that all such cost savings and efficiencies are legally irrelevant in the context of anticompetitive combinations. Joint Argument at 26. However, this argument takes for granted the existence of a per se or quick-look violation.[2] Unless and until Plaintiffs establish a per se or quick look violation, such as price fixing, we cannot categorically ignore identified and realized efficiencies. *See, e.g.*, *Copperweld*, 467 U.S. at 768; *Polk Bros.*, 776 F.2d at 189.

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[2] Moreover, Plaintiffs rely on § 2 monopoly cases for this proposition of law. In § 2 cases, cost savings and efficiencies are irrelevant because we are concerned with the dangers inherent in overwhelming market power. Plaintiffs have not brought a § 2 claim. *See* XIII Hovenkamp ¶ 2101, at 17 ("[J]oint ventures are analyzed under the 'restraint of trade' standard rather than the monopoly standard.").

APPENDIX B

D. Plaintiffs' Arguments

1. Plaintiffs' Price Fixing Theory

Plaintiffs approach the question of price fixing too literally. Though Equilon and Motiva charge different prices for Shell and Texaco branded gasoline, according to Plaintiffs, both "fix" prices because each has decided to price the brands together. As a hypothetical, Equilon may sell Shell and Texaco branded gasoline for $1.50 a gallon, while Motiva sells the same gallon for $1.75, but both "fix" prices because, whatever price they charge, each prices Shell and Texaco branded gasolines the same.

Plaintiffs' theory would impose artificial and unnecessary requirements on joint ventures. Whether Equilon and Motiva charge the same or different prices for both brands, each literally "fixes" a price where Defendants formerly set prices independently. Yet they and every other joint venture must, at some point, set prices for the products they sell. *See BMI*, 441 U.S. at 9.

Because almost any price setting constitutes price fixing under Plaintiffs' theory, Defendants would violate § 1 per se even if Equilon and Motiva had absolutely no connection to or interaction with each other. To avoid price fixing according to Plaintiffs' theory, Shell, Texaco and SRI would have to independently price the branded gasoline for Equilon or Motiva. While this may be possible temporarily, or in particular circumstances, there is no basis for imposing such an artificial arrangement indefinitely as a matter of law.[3]

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[3] At oral argument, Plaintiffs pointed out that Equilon and Motiva at least temporarily relied on their parents' former pricing systems. Equilon and Motiva apparently relied on the old pricing systems until new ones could be developed. Developing a new system would be one of the challenges faced by the joint ventures as they combined the considerable assets of their parents. The fact they temporarily relied upon the old

APPENDIX B

"[A] producer is free to fix and publish a retail price for his product and solicit business at that price." *See Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184, 1187 (9th Cir. 1984).

Plaintiffs would only allow joint ventures to establish prices for products that were somehow fundamentally new or different from those made by the parents. Requiring joint ventures to invent fundamental new products to operate independently or justify their existence would eliminate several types of efficient and pro-competitive combinations. Companies regularly combine assets for the legitimate purpose of realizing cost savings through economies of scale and information exchange, not only to develop new products.

In addition, Plaintiffs' price fixing theory is contrary to the undisputed facts. One person at Equilon and one person at Motiva set prices for both brands according to market conditions within their respective territories. Joints Facts ¶¶ 18-21, 62-63. Shell, Texaco and SRI did not jointly agree pre- or post-formation on one universal price that would be applied nationally through Equilon and Motiva. Furthermore, they had no reason to fix prices because once Equilon and Motiva were formed, Shell, Texaco and SRI no longer competed in the market for Shell and Texaco branded gasoline, either amongst themselves or against the ventures in the United States. Equilon and Motiva operate in different regions of the country and thus also do not compete against each other. *Id.* ¶¶ 42, 45, 62-63. A decision by Equilon to raise prices throughout the West Coast would not enable Motiva to raise prices on the East Coast.

Plaintiffs' theory has less to do with price fixing than with combinations in general. In essence, Plaintiffs seek per se or

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systems does not explain why, as a matter of law, they should be required to do so indefinitely.

quick-look treatment because of the loss of a competitor. With few exceptions, Plaintiffs' theory would act as a per se rule against joint ventures between companies that produce competing products. Every such venture deprives the market of a competitor to the extent that where there were two or more entities producing a product, now there is one. Because of this, and the reasons stated above, we decline to adopt Plaintiffs' theory of price fixing.

2. Equilon and Motiva as Shams

As an alternative to their per se price fixing theory, Plaintiffs contend the ventures have an overall and presumptively anticompetitive purpose or structure. We address Plaintiffs' numerous arguments on this subject individually and then as a whole.

a. Pre-formation Conduct and Decisions

i. Regulatory Review and Confidentiality Agreements

According to Plaintiffs, Defendants from the outset expected that any combination would be subject to regulatory review. Pls.' Facts ¶ 14. They executed confidentiality agreements, which included provisions to return or destroy information exchanged during the discussion / negotiation stage. *Id.* ¶ 15. Defendants purportedly failed to produce confidential documents exchanged during negotiations for government regulators. *Id.* ¶ 17. Thus Plaintiffs argue Defendants must have had an anticompetitive purpose.

Given Defendants' size, the nature of the oil industry, and the magnitude of the contemplated ventures, any business person would anticipate regulatory review. Defendants' foresight proves nothing. Second, confidentiality agreements serve an important business purpose. They protect sensitive financial information from dissemination or misuse by

competitors, while enabling companies to explore potential collaborative efforts.

Withholding information from regulators could suggest an illegitimate motive. *Id.* ¶ 17. However, Plaintiffs have no evidence that Defendants concealed documents. Plaintiffs cite two depositions: one deponent states she has no knowledge on the matter, Pls.' Vol. 2, Tab 17, at p. 356, and the other was not asked about the production of documents for regulators, *id.* at pp. 358-60. Without such evidence, Plaintiffs have failed to make any showing of an anticompetitive purpose based on the confidentiality agreements.

ii. Exclusion of Assets

Plaintiffs claim the exclusion of various assets from Equilon and Motiva reveals that Defendants never intended Equilon or Motiva to operate as integrated joint ventures. However, the purpose of joint ventures is to combine particular productive assets without undertaking complete mergers. *See, e.g.*, Fed. Trade Comm'n and U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors § 1.1, at 2, § 3.2, at 8 (April 2000) ("Antitrust Guidelines"). To realize the full benefits of a joint venture, the parents must of necessity exclude unrelated assets.[4] As always, the parents attempt to allocate resources where they will be most productive.

Here, Defendants formed Equilon and Motiva for the purpose of combining their downstream refining and marketing operations for branded gasoline. Joint Facts ¶¶ 12,

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[4] To the extent Plaintiffs believe *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), requires complete mergers, we disagree. *Citizen Publishing* did not "prevent all forms of joint operation." *Id.* at 135; *see also, infra* Section II.D.3.

31, 33, 36, 39, 40, 42, 45, 45. They did not include their worldwide businesses, upstream operations, marine fuels, aviation fuels, or chemical production plants, if any, because those assets and entities are not part of Defendants' downstream operations in the United States.

When selecting which assets to include in a joint venture, a parent company may reserve assets that serve vital functions in other businesses. Here, Defendants did not transfer ownership of the Shell and Texaco brands to Equilon and Motiva because they rely on those brands in other businesses around the globe. Because of the brands' international importance and value, forcing Shell and Texaco to transfer the brands to Equilon or Motiva is akin to requiring them to choose between merging or abandoning any joint venture. Joint venture parents are not required to abandon or devalue long-standing investments in brand good-will to avoid per se or quick-look condemnation. Furthermore, Equilon and Motiva have an exclusive right to license Shell and Texaco branded gasoline in the United States, Defs.' Fact ¶ 47, which is more than sufficient to enable each to fulfill its purpose.

A joint venture parent may also exclude assets because of prior commitments. In this case, the uncontroverted evidence is that Shell could not contribute Deer Park because it was a joint venture with PEMEX - the Mexican national oil company - and PEMEX rejected the proposal. Pls.' Facts ¶ 22 (Defs.' Response); Defs.' Facts ¶ 44. This is a legitimate reason for excluding Deer Park. Moreover, Shell's inability to include Deer Park explains why Texaco and SRI received the right to operate one comparable refinery independently. Pls.' Facts ¶ 27 and Defs.' Response. In any event, Plaintiffs have not explained how the exclusion of one relevant asset renders either Equilon or Motiva a sham. No reasonable trier of fact could conclude that the exclusion of Deer Park under these circumstances demonstrates that the joint ventures were shams designed to conceal price fixing.

APPENDIX B

iii. SRI's Ability to Compete Against Equilon

Since the formation of Equilon and Motiva, SRI has remained free to compete against Equilon. Joint Facts ¶ 60. This right, however, does not indicate that Equilon and Motiva are shams. It would be unnecessary to limit SRI's ability to compete against Equilon since SRI held no financial stake in Equilon. Given the absence of any financial connection between SRI and Equilon, an agreement restricting SRI's ability to compete in the Western United States might instead raise an inference of improper collusion.

iv. "Sole Risk" Provisions

Plaintiffs consider the presence of "sole risk" provisions evidence that Defendants still compete in the downstream market in the United States, and thus the ventures' only purpose was to drive up prices. To the contrary, the presence of "sole risk" provisions bolsters our initial conclusion that Equilon and Motiva are not patently anticompetitive. The "sole risk" provisions permit Defendants to engage in refining opportunities[5] rejected by either Equilon or Motiva. Defs.' Response to Pls.' Facts ¶ 25. Rather than unnecessarily constrain competition, this ensures efficient allocation of resources and promotes beneficial competition. If Shell, Texaco or SRI perceives an opportunity where Equilon and Motiva do not, market principles dictate that they should be free to invest accordingly.

v. Brand Management Protocol

At the time Equilon and Motiva were formed, Defendants entered into Brand Management Protocol agreements. For example, Motiva's Brand Management Protocol "recognize[s] that coordination between Equilon and [Motiva] of uniform

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[5] The "sole risk" provisions apply to refining, not marketing.

standards established by Texaco for the Texaco Symbols and by Shell for the Shell Symbols . . . enhances and protects the value, reputation, prestige and goodwill associated with" those symbols and brands. Pls.' Vol. 1, Tab. 3 at 141. The Protocol agreements regulate the use of the Shell and Texaco brands in the ventures' respective regions. *See id.* at p. 140. Plaintiffs view these agreements as evidence of Defendants' intent to eliminate competition.

The Brand Management Protocol agreements do not reveal an invidious anticompetitive purpose. Defendants had a mutual and legitimate interest in promoting both brands since they were the principal method for marketing Equilon's and Motiva's products. Since Defendants chose not to merge, they adopted a program to ensure that Equilon's and Motiva's use of the brands would not diminish their value in the United States or abroad.

An agreement defining and regulating acceptable practices for brands does not invariably result in anticompetitive harms. Nor does it reveal a patently anticompetitive purpose. As such, these agreements do not validate Plaintiffs' position.

vi. Ease of Dissolution

Plaintiffs assert that Equilon and Motiva can be "easily unraveled and dissolved," providing evidence that neither was intended to operate as a productive and integrated economic collaboration. Joint Argument at 17.

Equilon and Motiva are not "fly-by-night" operations. Defendants negotiated for over a year before forming Equilon and Motiva, Joint Facts ¶¶ 6-7, 33-34, which would be unnecessary if they simply intended to fix prices. Plaintiffs do not suggest that the negotiations leading up to the formation of Equilon and Motiva were perfunctory or that Defendants failed to undertake adequate due diligence regarding the potential costs or benefits of formation.

APPENDIX B

In addition, the right to dissolve Equilon and Motiva upon mutual consent must be evaluated alongside the substantial financial commitments made when forming the ventures. Equilon and Motiva control numerous refineries, lubricant plants, research laboratories, terminals, thousands of service stations, miles of pipeline, and employees. *Id.* ¶ 48. If Defendants wanted the ability to readily dissolve Equilon and Motiva, they would not have entrusted the ventures with such extensive resources. The significant integration of assets itself suggests that Defendants intended Equilon and Motiva to function as true joint ventures, rather than covers for price fixing. In any event, joint venture agreements frequently provide for dissolution upon mutual consent. The presence of such clauses does not indicate an intent to illegally fix prices.

Other than by mutual consent, Equilon and Motiva can only be dissolved after five years, effective two years after notice. *Id.* at ¶ 51. A five-year minimum with two-years notice would allow Defendants to move forward with Equilon and Motiva, hopefully recouping their investments, while leaving room should changes occur in the market or Defendants' individual circumstances.[6] Five years represents a significant commitment to the future of Equilon and Motiva.

Consequently, the above-described dissolution provisions are not per se illegal, and we do not see how an observer with only a rudimentary understanding of economics could view them as presumptively anticompetitive, especially in light of the time, effort, and resources invested into Equilon and Motiva. *See Cal. Dental. Ass'n*, 526 U.S. at 770.

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[6] Plaintiffs allege that Texaco is currently negotiating its withdrawal from the "Alliance, necessitated by Texaco's agreement to be acquired by Chevron." Joint Argument at 17. Chevron's acquisition of Texaco, resulting in Texaco's need to withdraw, serves as an example of why joint venturers provide for dissolution upon consent or reasonable notice.

APPENDIX B

b. Post-formation Conduct

i. Members Committee Meetings

Plaintiffs believe that Defendants "govern" Equilon and Motiva through Members Committees, presumably to carry out their price fixing conspiracy. Pls.' Facts ¶ 30. The Members Committee for Equilon consists of four Shell representatives and three Texaco representatives. *Id.* Motiva's Members Committee consists of two representatives from Shell, Texaco and SRI. *Id.* The Members Committees set "policies, business plans, and budgets" for the CEOs and officers running the ventures. *Id.* ¶ 32. Representatives on the Equilon and Motiva Members Committees have separate staffs at their own companies. *Id.* ¶ 42.

To begin, Defendants had a legitimate interest in forming Members Committees to protect their substantial investments in Equilon and Motiva. In fact, it would be difficult to conceive of another method of management of a joint venture where the parents wish to maintain an actual, not passive, role in the advancement of their mutual interests.

Even assuming the same representatives from Shell and Texaco served on both committees, we cannot infer a conspiracy merely because Plaintiffs identified an opportunity to conspire. *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999) (refusing to "infer participation in the conspiracy from the opportunity to do so. Such meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity."). The existence of Members Committees does not tend to exclude the equally likely inference of legitimate conduct, such as to protect and promote the Defendants' shared interest in the Shell and Texaco brands.

ii. Relationship Between Pricing & Purpose

Plaintiffs claim the practice of pricing Shell and Texaco brands the same is not sufficiently related to the joint

ventures' beneficial efficiency-producing activities. Joint Argument at 26-28; Pls.' Facts ¶¶ 45, 47. Plaintiffs argue that since Defendants did not identify any cost savings related to pricing at the time of formation, they had no reason for subsequently pricing both brands the same, except to raise prices. *Id.*

The fact that Defendants did not identify cost savings related to pricing at the time of formation does not negate the other substantial savings and efficiencies anticipated from formation. Antitrust law does not require every business decision to generate additional identifiable savings to survive per se or quick look scrutiny. Plaintiffs also do not explain how the decision to set the same price for Shell and Texaco branded gasoline after formation is inconsistent with permissible business practices.

Defendants offer a plausible and justifiable reason why Equilon and Motiva would independently choose to set the price of Shell and Texaco branded gasoline the same: from the perspective of the ventures, the products are fungible. While the brands appeal to different customers, Joint Facts ¶ 66, and contain different additives, Pls.' Fact ¶ 46, Plaintiffs provide no evidence that the costs of producing the brands, whether related to physical production, marketing, or advertising, would lead an efficient venture to set different prices for Shell and Texaco branded gasoline.

iii. Parallel Pricing

Plaintiffs assert that "[w]ithin a relatively short time after their formation, Equilon and Motiva implemented a practice of charging the same price for the Shell and Texaco brands of gasoline in each of the pricing areas into which Equilon and Motiva had divided their geographic spheres of operation." Pls.' Facts ¶ 36. "Parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are

sufficient other 'plus' factors, an inference of conspiracy can be reasonable." *In re Citric Acid*, 191 F.3d at 1102.

This is not a case of parallel pricing. Equilon and Motiva do not charge identical prices across the country, and the evidence does not reveal an agreement about what prices the other should charge. The parties stipulate that one person at Equilon sets prices for Equilon's territory, one person at Motiva sets prices for Motiva's territory, and each sets prices based on local market conditions. Joint Facts ¶¶ 62, 63.[7]

The conduct in question is consistent with the practical consequences of forming Equilon and Motiva. Once formed, Equilon and Motiva had the power to establish any price for their products, just as any other business does, without collaborating with each other or Defendants. It is arbitrary to infer a conspiracy from the decision to charge the same versus different prices for both brands, since in any event, Equilon and Motiva produce both products and receive all of the revenues. In effect, Plaintiffs want the joint ventures to charge different prices for the brands and thus compete against themselves. "[Y]et no law requires competition within a company." *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002).

Furthermore, Plaintiffs have failed to overcome an additional burden. If the intent and plan to "fix" prices arose after formation, one cannot immediately assume that Defendants consciously committed themselves to such a scheme either pre- or post-formation. We are not suggesting, as Defendants do, that the post-formation conduct of Equilon

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[7] At most, Defendants have exchanged information relating to the marketing of Shell and Texaco branded gasoline. However, information exchange is not per se illegal. *United States Gypsum Co.*, 438 U.S. at 440-41 & n.16. Some information exchange between Equilon and Motiva is necessary to protect and develop the jointly shared brands as resources.

and Motiva can never be considered evidence of pre-formation anticompetitive intent. *See* Joint Argument at 44-48 (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)). *Copperweld* did "not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." 467 U.S. at 767; *see also Fraser*, 284 F.3d at 56-60 (rejecting argument that LLC members could not violate § 1 when the only complained of conduct occurred post-formation). But just as we do not attribute the acts of a subsidiary to a parent in other contexts, after a certain point it would be improper to attribute the post-formation conduct of Equilon or Motiva to Defendants for purposes of proving a § 1 conspiracy absent other evidence that the ventures are shams.[8]

In this case, Equilon and Motiva had a separate and legitimate reason for pricing Shell and Texaco branded gasoline the same – they were fungible. *See supra* discussion. Like any other business, they may set prices for their products. *See Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184, 1187 (9th Cir. 1984).

iv. Strategic Marketing Initiative and "Price Optimization"

According to Plaintiffs,

> Defendants implemented their price fixing in conjunction with a joint program called the Strategic Marketing Initiative, which was developed by Equilon, Motiva, and related service companies as an Alliance-wide program;

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[8] We recognize that a price fixing conspiracy offends § 1 whether former competitors agree beforehand to fix prices immediately upon formation or agree to wait eight months after formation to raise prices. Here, Plaintiffs have not raised a triable issue of fact as to a price fixing conspiracy.

APPENDIX B

> [it] called for price fixing as a means of "price optimization"; and [it] was regularly reviewed with the Members Committees of both Equilon and Motiva.

Pls.' Facts ¶ 37.

Plaintiffs reliance on the Strategic Marketing Initiative combines arguments we have already rejected. First, Plaintiffs rely on the theory that any setting of price by Equilon or Motiva constitutes "price fixing." If this were true, few joint ventures would survive § 1 scrutiny. Second, Plaintiffs attach significance to the fact that the Strategic Marketing Initiative was presented to the Members Committees for Equilon and Motiva. The fact Members Committees considered the same information does not automatically establish a nationwide conspiracy. *See In re Citric Acid*, 191 F.3d at 1103.

Plaintiffs also overlook the stated purpose of the Initiative, to develop the Shell and Texaco brands. Equilon and Motiva had a separate and legitimate interest in marketing the brands. Since Equilon and Motiva produce and market both brands, they have a legitimate reason to consider similar information and strategies. The Strategic Marketing Initiative, much like the Brand Management Protocol agreements, supports maintenance of the brands and their use by the ventures, something which we cannot lightly condemn as unavoidably anticompetitive. *See United States Gypsum Co.*, 438 U.S. at 440-41 & n.16.

v. Price Anomalies

Plaintiffs want us to assume an anticompetitive purpose or structure from the fact that Equilon and Motiva's wholesale prices rose when crude oil prices hovered around historic lows. Pls.' Facts ¶ 38.

APPENDIX B

If Equilon and Motiva were the only participants in the downstream market who raised prices during this period, one might suspect that they engaged in some type of anticompetitive collaboration. Yet we cannot determine whether all other downstream refiners also enjoyed higher wholesale prices despite the record low prices for crude oil. As a result, we might condemn Equilon and Motiva for benefiting from a phenomenon experienced across the entire downstream market at that time.[9]

vi. Failure to "Pass" Savings onto Consumers

Plaintiffs accuse Defendants of never explicitly directing that cost savings be passed onto consumers. *Id.* ¶ 41. Companies are not required to "pass on" savings to consumers in the form of lower prices. Absent monopoly power or a proven anticompetitive restraint, every business has the legitimate option of passing savings onto consumers in the form of lower prices or to shareholders in the form of increased stock values. The decision to retain all or some of any realized savings does not raise a triable issue on Plaintiffs' contention that the ventures were created for the purpose of fixing prices or that they almost certainly had anticompetitive effects.

vii. Post-formation Cost Savings

Plaintiffs also complain that "The Alliance" eliminated duplicative or redundant expenses and avoided capital expenditures. Pls.' Facts ¶¶ 39, 40. The fact Defendants

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[9] Even if we assume Equilon and Motiva controlled over twenty-five (25) percent of the branded gasoline in specific markets, Pls.' Facts ¶ 33, we have no evidence that Equilon and Motiva contributed to the national rise in wholesale prices. Even in a concentrated market, "rising prices do not themselves permit an inference of a collusive market dynamic." *See Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 236-37 (1993).

achieved cost savings bolsters one of their stated legitimate reasons for forming the ventures. The fact they actually commenced such programs indicates Equilon and Motiva were not simply fronts for an illegal conspiracy or combination. Hence, this provides no basis for inferring an anticompetitive purpose.

c. Summary

After carefully reviewing and considering Plaintiffs' evidence and arguments, and drawing all reasonable inferences in Plaintiffs' favor, we nonetheless conclude a reasonable trier of fact could not find that Defendants formed Equilon and Motiva merely to achieve an ulterior anticompetitive purpose or that the ventures are patently anticompetitive. None of the conduct identified by Plaintiffs is of the type that "always tend[s] to restrict competition and decrease output . . . ." *Am. Ad Mgmt.*, 92 F. 3d at 787. Our conclusion is reinforced by the fact that Defendants shared risks based on capital contributions, *see Maricopa County Med. Soc'y*, 457 U.S. at 356-57, and the fact that Equilon and Motiva achieved greater efficiency, productivity, and savings, *see Polk Bros., Inc.*, 776 F.2d at 189.

3. *Citizen Publishing*

Despite the evidence of efficiencies and savings, Plaintiffs believe we must follow *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), and hold Defendants liable under the per se and/or quick-look doctrines. The defendants in *Citizen* formed a joint venture to sell and distribute newspapers, yet maintained separate news and editorial departments. *Citizen*, 394 U.S. at 134. The newspapers realized considerable savings from combining their circulation and advertising departments. *United States v. Citizen Publ'g Co.*, 280 F. Supp. 978, 982 (D. Ariz. 1968). In spite of the savings, the Supreme Court concluded the joint

venture violated § 1 per se. *Citizen*, 394 U.S. at 135. In so doing, the Court relied primarily on three facts: the newspapers pooled profits according to a fixed ratio, agreed not to compete, and improperly divided the market for daily newspapers. *Id.*

The profit pooling and non-compete arrangements in *Citizen* differ in several substantial respects from those in the instant case. First, the defendants, the *Star* and the *Citizen*, were the only daily newspapers in Tucson, Arizona. *Id.* at 133. By joining their circulation and advertising departments, they eliminated all competition for daily papers in Tucson. *Id.* at 133-34. In contrast, Equilon and Motiva continue to compete with several major oil companies in their relevant markets.

Second, the *Star* and the *Citizen* combined for the specific purpose of restricting competition and fixing prices. *Citizen Publ'g*, 280 F. Supp. at 993. Before forming the venture, the *Star* and the *Citizen* agreed to raise advertising rates within one year and in fact raised rates within that period. *Id.* at 982. The Supreme Court could safely presume anticompetitive harms since that was the express purpose from the outset. Without evidence of such an intent here, we cannot lightly ignore the legitimate and significant reasons offered by Defendants.

Third, the non-compete provision in *Citizen* was part of an agreement to divide the market for daily newspapers. It prohibited the *Star*, the *Citizen*, or any of their stockholders or executives from forming a competing daily newspaper in Pima County, the metropolitan area of Tucson. *Citizen*, 394 U.S. at 135-36. It effectively divided the market because there were only two competitors. *Id.* Here, Equilon and Motiva operate in diverse markets with several competitors.

In addition, their non-compete provisions are not nearly as broad.[10]

Consequently, the three reasons supporting the *Citizen* Court's conclusion do not apply to Equilon and Motiva. Still, Plaintiffs note a possible organizational similarity between the joint venture in *Citizen* and Equilon and Motiva. The joint venture in *Citizen* priced, sold and distributed newspapers, yet the *Star* and *Citizen* maintained separate news and editorial departments. Equilon and Motiva market and refine gasoline, yet Shell and Texaco retain the ultimate rights to the Shell and Texaco brands and additives.

This organizational similarity, if any, does not compel per se condemnation. The joint venture in *Citizen* performed one aspect of producing newspapers, the physical printing and distribution, yet set prices and advertising rates as if it was responsible for all aspects of production. In this case, Equilon and Motiva have responsibility for purchasing necessary inputs and then refining and marketing Shell and Texaco branded gasoline. It is therefore appropriate that they set prices for Shell and Texaco branded gasoline.

To the extent other similarities may exist between the venture in *Citizen* and Equilon and Motiva, they do not justify per se condemnation. *Citizen* did not elaborate on its § 1 per se analysis, and Plaintiffs cite no authorities building upon this part of the analysis.[11] We are reluctant to hypothesize about its application given recent Supreme Court admonitions

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[10] Even if Defendants' non-compete clauses were analogous, Plaintiffs waived any right to recover under a § 1 theory of market division. Thus, this aspect of *Citizen* is inapposite.

[11] Congress overruled *Citizen* by statute as it applied to combinations between newspapers. *See Haw. Newspapers Agency v. Bronster*, 103 F.3d 742, 744 (9th Cir. 1996) (*citing* Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1970)).

against expanding the scope of per se liability. *Khan*, 522 U.S. at 10 (citing *Ind. Federation of Dentists*, 476 at 458-59); *see also Sammi Corp.*, 82 F.3d at 844.

4. Summary of Per se / Quick-Look

We recognize that upon a full rule of reason analysis the anticompetitive effects attendant to the formation of Equilon and Motiva, if any, might outweigh the benefits Defendants realized in cost savings and efficiencies. However, Plaintiffs have eschewed an exhaustive rule of reason analysis. We conclude Plaintiffs have failed to raise a triable issue of material fact on either price fixing or the presumptively anticompetitive nature of Equilon and Motiva. As a result, Plaintiffs failed to raise a triable issue of fact as to Defendants' liability under the per se or quick-look doctrines.

III. Disposition

Accordingly, Defendants' Motion is **GRANTED** as Plaintiffs failed to raise a triable issue of fact as to per se or quick-look § 1 liability. Defendants' purported *Copperweld* defense is **DENIED** as moot. Plaintiffs' Motion is **DENIED**.[12]

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[12] Plaintiffs carry the ultimate burden of proof at trial and have the burden of showing entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Because we conclude they failed to even raise a triable issue of material fact, they cannot show entitlement to judgment as a matter of law.

APPENDIX B

IT IS SO ORDERED.

Dated: 8/13/02

/s/
GEORGE H. KING
United States District Judge

APPENDIX C

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED MAY 21, 2001

No. CV 99-6114-GHK (JWJx)

FOUAD N. DAGHER, ET AL.,

v.

SAUDI REFINING, INC., ET AL.

May 21, 2002

MEMORANDUM AND ORDER RE: JOINT BRIEFINGS ON MOTIONS FOR SUMMARY JUDGMENT

I. Introduction

This matter is before the court on the parties' joint briefings on motions for summary judgment. The motions came on regularly for hearing on December 10, 2001. We rule as follows on SRI's motion with *respect* to standing after considering the joint briefs, all pertinent papers, the evidence, and oral argument:

II. Procedural History

On June 15, 1999, Plaintiffs Fouad N. Dagher et al. commenced this action on behalf of themselves and approximately 23,000 shell and Texaco branded service station owners nationwide. On January 28, 2001, in an amended order, we granted in part and denied in part Defendants' Rule 12(b)(6) motion to dismiss. We granted the

motion insofar as Plaintiffs based a § 1 claim on division of markets and customers, and manipulation of service station leases. We denied the motion to the extent Plaintiffs alleged a § 1 price fixing conspiracy through the vehicle of two joint ventures: Equilon Enterprises LLC ("Equilon"), located in the Western United States, and Motiva Enterprises LLC ("Motiva"), located in the Eastern United States.

Though Plaintiffs amended their complaint to reallege market division and lease manipulation, Pls.' Second Am. Compl. ¶¶ 99-100, 103, they have since explicitly waived reliance on either theory as an independent basis for § 1 liability. *See, e.g.*, Tr. of Hearing on Mot. to Dismiss, 14:23-15:6; 15:24-16:8 (December 6, 1999). In addition, Plaintiffs have limited themselves to the per se and quick-look doctrines, forsaking the traditional rule of reason analysis. We approach the cross-motions for summary judgment in light of this particular procedural posture.

III. Undisputed Facts[1]

A. Terminology

Major oil companies describe operations as "upstream" or "downstream". Joint Facts ¶ 12. Upstream operations consist of exploring for and producing crude oil. *Id.* Downstream

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[1] Pursuant to an earlier order, the parties filed a "Joint Stipulation of Uncontroverted Facts and Conclusions of Law" on July 27, 2001. On October 5, 2001, they filed a new copy to conform with changes in the Local Rules and incorporate the deposition testimony of a Defense witness. For ease of reference, the facts stipulated to by all parties are herein referred to as "Joint Facts". Additional statements of uncontroverted facts will be referred to as "Pls.' Facts" or "Defs.' Facts".

The parties also refiled a "Joint Stipulation of Parties with Respect to Issues to be Decided for Summary Judgment," hereinafter cited as "Joint Argument."

operations entail refining crude into gasoline and other products, and marketing the finished goods.

For Defendants, the wholesale level consists of selling branded gasoline in bulk to retailers and resellers. *Id.* ¶ 15. Retailers sell branded gasoline to consumers at service stations. *Id.*

B. Pre-Formation Negotiations

Prior to the formation of the joint ventures, Shell Oil Company ("Shell"), Texaco, Inc. ("Texaco") arid Star Enterprise ("Star")[2] independently refined and marketed gasoline at both the wholesale and retail levels through their own marketing departments. *Id.* ¶¶ 15, 25, 62. Each Defendant set wholesale prices within its own refining and marketing organization. *Id.* ¶¶ 26-27.

Shell, Texaco and Saudi Refining, Inc. ("SRI") considered the downstream refining and marketing business intensely competitive and expected the intense competition to continue. *Id.* ¶ 31. In March of 1996, Shell and Texaco discussed, among other things, consolidation of their downstream assets in the United States. *Id.* ¶ 33. Star joined the discussions at some point thereafter. *Id.* ¶ 34.

Shell, Texaco and Star believed the oil industry was about to enter a period of consolidation. *Id.* ¶ 35. They established a synergy team and steering committee with employees from all three companies to explore the possibility of consolidation. *Id.* ¶ 36. The synergy team exchanged information on historical refining and marketing margins, and revenue and profitability forecasts. *Id.* ¶¶ 37-38.

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[2] From 1989 to 1998, Saudi Refining, Inc. and Texaco operated a joint venture, Star Enterprise, in the Eastern United States. Joint Facts ¶ 4. Star refined and marketed gasoline under the Texaco brand. *Id.*

APPENDIX C

In June of 1996, the team reported that combining downstream operations could potentially reduce costs by $800 million annually, $550 million attributable to Equilon and $250 million attributable to Motiva. *Id.* ¶ 39. Encouraged, Texaco, Shell and SRI formed negotiating teams to formulate terms for a combination. *Id.* ¶ 40. During the negotiations, Texaco and Shell established a standstill agreement under which Shell agreed not to initiate a takeover of Texaco for a specified period. *Id.* ¶ 41.

C. Formation / Terms of Formation

Equilon was formed on January 1, 1998, and Motiva was formed on July 1, 1998. *Id.* ¶¶ 6-7. Under the Equilon agreement, Shell and Texaco allocated gains and losses in proportion to the assets contributed at formation: Shell 56% and Texaco 44%. *Id.* ¶ 43. Similarly, Shell, Texaco and SRI shared risks and losses in proportion to the assets contributed to form Motiva:[3] Shell 35% and Texaco and SRI 32.5% each. *Id.* ¶¶ 46-47.

The downstream assets in Equilon and Motiva include twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees. *Id.* ¶ 48. Shell and Texaco did not include their marine fuel businesses or upstream operations. *Id.* ¶¶ 49-50. Texaco and Shell also did not transfer ownership of their trademarks to Equilon or Motiva. *Id.* ¶ 52.

Equilon and Motiva market gasoline under the Shell and Texaco brands[4] pursuant to written license agreements. *Id.*

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[3] Star was terminated, and its assets unwound. *Id.* ¶ 44.

[4] To some extent, Shell and Texaco brands appeal to and target different customers. *Id.* at ¶ 66. Texaco customers tend to be blue-collar and rural, while Shell customers are more affluent and urban. *Id.*

¶¶ 52-53. The licenses are subject to Brand Management Protocal agreements that generally require that both brands be preserved and treated equally. *Id.* ¶¶ 54-55. In addition, a Brand Management Council oversees the use and management of the Shell and Texaco brands. *Id.* ¶ 56.

Shell and Texaco agreed not to compete with Equilon, and agreed not to manufacture and market certain products in Equilon's geographic area (the Western United States), including fuel, synthetic gasoline and electricity. *Id.* ¶ 58. Shell, Texaco and SRI agreed not to compete with Motiva, and agreed not to manufacture and market certain products in Motiva's geographic area (the Eastern United States), including fuel, synthetic gasoline and electricity. *Id.* ¶ 59. Under the Motiva agreement, SRI retained the option of refining and marketing in the Western United States. *Id.* ¶ 60.

Equilon and Motiva have their own Chief Executive Officers ("CEO"). *Id.* ¶ 57. They can be dissolved at any time by mutual consent and unilaterally after five years, effective two years after notice. *Id.* ¶ 51.

D. Post-Formation

"The formation of Equilon ended competition between Shell and Texaco in the Western United States with respect to downstream refining and marketing of gasoline." *Id.* ¶ 42. "The formation of Motiva ended competition between Shell and Star in the Eastern United States with respect to the downstream refining and marketing of gasoline." *Id.* ¶ 45. One person at Equilon sets prices for both Shell and Texaco brands in Equilon's pricing area, and one person at Motiva sets prices for both brands in Motiva's area. *Id.* ¶ 62.

Equilon and Motive set prices in thousands of distinct geographic trade areas based on local conditions. *Id.* ¶¶ 18-21, 63. They refine, maintain and market Shell and Texaco branded gasoline directly to independent Texaco and Shell

service station operators, who own or lease service stations from Equilon or Motiva. *Id.* ¶¶ 10, 61.

Plaintiff s never purchased gasoline from SRI, Star or Motiva. *Id.* ¶ 9.

IV. Summary Judgment

Summary judgment is appropriate when no dispute exists as to the material facts, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *see, e.g., Toscano v. Prof'l Golfers' Ass'n*, 258 F.3d 978, 982 (9th Cir. 2001). We view the evidence in the light most favorable to the non-movant. *County of Toulumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). The non-movant can defeat summary judgment by demonstrating that the evidence, taken as a whole, could lead a rational trier of fact to find in its favor. *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The parties must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A party opposing summary judgment must direct our attention to specific, triable facts. Hon. William W Schwarzer, et al., Cal. Practice Guide: Federal Civil Procedure Before Trial § 14:101.1, at 14-24.2 (2001). General references without page or line numbers are not sufficiently specific. *Id.* (citing *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988)); *see also Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2000) (citing similar holdings in the Fifth, Sixth, Seventh, and Tenth Circuits); *Forsberg v. Pac. Northwest Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) ("The district judge is not required to comb the record to find some reason to deny a motion for summary judgment."). In the context of cross-motions for summary judgment, we consider specifically identified citations in either party's moving papers as well as their oppositions. *Fair Housing*

Council v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001).

V. Plaintiffs' § 1 Standing with Respect to SRI

Plaintiffs claim they have standing with respect to SRI as a purported co-conspirator with Shell and Texaco in a price fixing conspiracy. Because standing goes to the justiciability of Plaintiffs' claim against SRI, we address that issue first.[5]

A. Antitrust Conspiracy Cases

Plaintiff s have the initial burden of proving a "contract, combination, or conspiracy between two or more entities" in violation of § 1 of the Sherman Act. 15 U.S.C. § 1; *In re Citric Acid Litig.*, 191 F.3d 1090, 1093 (9th Cir. 1999) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984)); *see also Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996). To establish § 1 standing, Plaintiffs must prove SRI's antitrust violations, if any, caused them harm. See *Orr v. Bank of Am., NT & SA*, 285 F. 3d 764, 2002 U.S. App. LEXIS 3418, *37-33 (9th Cir. 2002); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000); *Am. Ad Mgmt., Inc. v. GTE Corp.*, 190 F.3d 1051, 1055 (9th Cir. 1998).

Since Plaintiffs never purchased products from Motiva, Star or SRI, and waived any claims based on market division, they could not suffer an actionable § 1 harm based on SRI's role in forming Motiva alone. Plaintiffs need some connection between SRI and the alleged price fixing in the Western United States. Therefore, Plaintiffs have set out to prove "that Shell, Texaco, and SRI combined and conspired with each other to fix prices, using the combinations Equilon and

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[5] This order resolves only the issue of Plaintiffs' standing against SRI. The remaining issues will be addressed separately in a subsequent order.

Motiva to implement their conspiracy . . . ." Joint Argument, p. 49. Second, "the formation of Equilon and Motiva was itself a violation of Section 1 as a conspiracy by defendants to fix prices." *Id.* "Thus Equilon's price-fixing was part of an Alliance-wide initiative, known to, joined in, and approved of by SRI . . . ." *Id.*, p. 55.

To be liable as a co-conspirator under § 1, a defendant must have a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Toscano v. Prof'l Golfers' Ass'n*, 258 F.3d 978, 983 (9th Cir. 2001). The inference of conspiracy must be reasonable in light of the competing inference that the conduct was engaged in independently and must tend to exclude the possibility of independent action. *In re Citric Acid*, 191 F.3d at 1094 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574., 586 (1986)). Conduct as consistent with legitimate competition as illegal price fixing cannot, standing alone, support an inference of antitrust conspiracy. *Id.* (citing *Matsushita*, 475 U.S. at 588)).

Plaintiffs can raise a genuine issue of material fact by either producing direct evidence of an illegal conspiracy to fix prices, or through circumstantial evidence "from which a reasonable factfinder could conclude that [defendants] conspired" to fix prices. *In re Citric Acid Litig.*, 191 F.3d at 1093.. Direct evidence requires no inference to reach the proponent's desired conclusion. *County of Tuolumne*, 236 F.3d at 1155 (citing *In re Citric Acid*, 191 F.3d at 1093-94). "Direct evidence is that which can defeat a request for summary judgment 'if taken as true,' whereas circumstantial evidence can defeat a summary judgment motion only if inferences are drawn in the nonmovant's favor." *Toscano*, 258 F.3d at 983.

If Plaintiffs have only circumstantial evidence of conspiracy, Defendants can rebut the "allegation of

conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." *Id.* at 1094 (quoting *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987)). At that point, the burden shifts back to Plaintiffs to provide "specific evidence tending to show that the defendant was not engaging in permissible competitive behavior." *Id.* We consider the evidence individually and as a whole to determine if it tends to exclude the possibility of legitimate and independent conduct. *Id.* at 1094-1106.

B. Plaintiffs' Evidence as to SRI

Plaintiffs devote less than two pages in opposition to this issue, and provide no citations to the record. Yet, among other things, Plaintiffs filed four volumes of materials totaling 1,054 pages.[6] Plaintiffs' only citations in the moving papers appear in a "factual background" on the separate issue of whether Equilon and Motiva are sufficiently integrated to avoid per se or quick-look liability. As a result, most of Plaintiffs' arguments and evidence do not relate to whether SRI specifically and consciously intended to conspire with Shell and Texaco in the Western United States.

1. Plaintiffs' Initial Burden

Plaintiffs have no direct evidence that SRI conspired to fix prices. Rather, plaintiffs argue that the circumstantial evidence taken as a whole establishes SRI was a co-conspirator. Equilon and Motiva allegedly:

> were formed as part of a single, unbroken series of negotiations among Shell, Texaco, and SRI to create The Alliance, in which all three shared.

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[6] Defendants submitted fourteen volumes. Hereinafter, where applicable, we cite submissions by volume, tab, and page number.

APPENDIX C

> After its formation, The Alliance developed a Strategic Marketing Initiative, pursuant to which price-fixing was implemented Alliance-wide in the name of "price optimization," all of which was well-known to the Members Committees of Equilon and Motiva, where SRI was represented by Saudi Aramco executives.[7]

Joint Argument, p. 55 (footnote added).

Plaintiffs have not established that SRI participated in the overall formation of a price-fixing "Alliance." As proof that Motiva was the "culmination" of Defendants' negotiations, Plaintiffs cite "agreements entered into by defendants in connection with the formation of" Equilon and Motiva. Pls.' Fact ¶¶ 2-3; Shulman Decl. ¶¶ 6-7 (referring to Pls.' Vol. 1, Tabs 2-3). For example, the Equilon Master Agreement mentions that Shell, Texaco and SRI were in negotiations for the creation of "Eastco" (the name initially anticipated for Motiva). Pls.' Vol. 1, Tab 3, p. 27. Similarly, the Motiva Master Agreement mentions that Shell and Texaco had already formed Equilon. Id. at p. 82. However, references to potential future agreements or prior agreements do not reveal an intent to engage in price fixing or an illicit conspiracy. Such references are equally consistent with legitimate conduct and sound document drafting.[8]

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[7] Plaintiffs refer to Saudi Aramco in an effort to strengthen the alleged connection between SRI and the purported nationwide conspiracy. Pls.' Facts ¶¶ 1, 18, 19, 31. Upon our review, again without the benefit of specific citations to page and line numbers, we found the evidence touching upon Saudi Aramco only relates to the formation of Motiva, the unwinding of Star, and the assumption by Motiva of Star's obligations. *See id.* The evidence does not, as Plaintiffs argue, raise an inference that Saudi Aramco directed or instructed SRI to participate in an illegal scheme in the Western United States.

[8] Plaintiffs also cite deposition testimony, none of which tends to

APPENDIX C

In addition, a short-hand name adopted after formation, "The Alliance," *does* not reveal a pre-formation intent to conspire. *See* Joint Arg. p. 55; Pls.' Fact ¶ 4. The name does not tend to exclude the possibility of legitimate coordination, such as for the purpose of protecting the Shell and Texaco brands. *See Richards v. Neilsen Freight Lines*, 810 F.2d 898, 903 (9th Cir. 1987) (affirming summary judgment and rejecting testimony about a "gentlemen's agreement" as circumstantial evidence of a conspiracy since it was equally consistent with legitimate conduct).

Moreover, Plaintiffs have not adequately shown how the Strategic Marketing Initiative reveals an intent by SRI to conspire as to the Western United States. *See* Joint Arg. p. 55; Pls.' Facts ¶ 37. Plaintiffs' evidence shows that the exchange of information occurred for the purpose of promoting the Shell and Texaco brands. Since Equilon and Motiva rely on the Shell and Texaco brands to market gasoline, they have a mutual and legitimate interest in protecting them. An agreement to protect brands does not reveal an intent to illegally fix prices, let alone an intent by SRI to do so in the Western United States.

In any event, Plaintiffs never explain why SRI would have any interest in participating in a conspiracy to fix prices in the Western United States. SRI has no apparent motive to conspire with Shell and Texaco with respect to Equilon and the Western United States because Equilon and Motiva operate in different regions of the country. SRI also does not share in Equilon's profits and does not itself operate in the Western United States, Joint Facts ¶ 43, so SRI would not benefit from any potential anticompetitive effects in Equilon's territory.

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implicate SRI.

Therefore, Plaintiffs' circumstantial evidence does not tend to exclude the possibility of legitimate conduct on the part of SRI. As Plaintiffs failed to come forward with sufficient evidence to satisfy their initial burden of proving a § 1 conspiracy, SRI is entitled to summary judgment as a matter of law.

2. SRI's Plausible and Justifiable Reason

Assuming Plaintiffs satisfied their initial burden, Defendants identified $800 million in potential savings from the formation of Equilon and Motiva, $250 million attributable to Motiva. Joint Facts ¶ 39. Though perhaps optimistic, Plaintiffs do not contend these numbers were fabricated. Nor do Plaintiffs claim that the anticipated savings resulted from a haphazard or cursory evaluation process. Consequently, the undisputed evidence shows that SRI had a plausible and justifiable reason for forming Motiva. The burden now shifts to Plaintiffs to present specific evidence tending to exclude the possibility of legitimate or independent conduct by SRI.

3. Plaintiffs' Specific Evidence

Even if we construe Plaintiffs' evidence as overcoming the initial threshold, we find no specific evidence that tends to show SRI consciously committed itself to engage in a conspiracy that included the Western United States. Nor does the evidence raise doubts as to SRI's claimed reason for participating in the formation of Motiva.

C. Summary of Evidence

Plaintiffs lack direct or circumstantial evidence "sufficiently unambiguous to permit a trier of fact to find that [SRI] conspired" to fix prices in the Western United States absent "any apparent motive to do so." *Matsushita*, 475 U.S. at 597. Viewing the evidence in the light most favorable to

APPENDIX C

Plaintiffs, we find no triable issue of fact regarding whether SRI participated in an illegal conspiracy to fix prices in the Western United States in violation of § 1 of the Sherman Act. Therefore, SRI is entitled to summary judgment as a matter of law.

VI. Disposition

SRI' Motion for Summary Judgment on the issue of antitrust standing is **GRANTED**.

Dated: 5/21/02

/s/
GEORGE H. KING
United States District Judge

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC

No. 02-56509

FOUAD N. DAGHER, ET AL.,

v.

SAUDI REFINING INC., ET AL.

September 15, 2004

ORDER

Before: REINHARDT, FERNANDEZ, and RAWLINSON, Circuit Judges.

The panel has voted unanimously to deny the petitions for rehearing, and a majority of the panel voted to deny the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied.

Nos. 04-805 and 04-814

Supreme Court, U.S.
FILED
JAN 7 - 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented by petitioners is not in fact presented in the record of this case, as will be shown. If any question is presented, it is whether the Ninth Circuit correctly found the per se rule applicable to an agreement between competitors on the price at which their respective brands of gasoline would be sold by a joint venture.

LIST OF RESPONDENTS

Fouad N. Dagher
Bisharat Enterprises, Inc.
Alfred Buczkowski
Esequiel Delgado
Mahwash Farzaneh
Nasser El-Radi
G.G.&R. Petroleum, Inc.
H.J.F. Inc.
Kaleco, Co.
Mike M. Madani
Carlos Marquez
Sami Merhi
Edgardo P. Parungao
Paul E. Peterson
Ron Abel Serv. Center, Inc.
Jerry's Shell Serv. Center, Inc.
Gullermo Ramirez
Leopoloo Ramirez
Nazar Sheibaini
Sitara Management Corporation
Tinsel Enterprises, Inc.
Quang Truong
Steven Ray Vezerian
Los Feliz Shell, Inc.
Nassim Hanna

RESPONDENTS' RULE 29.6 DISCLOSURE

Respondents state that none of the respondents has a parent corporation and that no publicly held company owns ten percent or more of any of the respondents' stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF RESPONDENTS	ii
RESPONDENTS' RULE 29.6 DISCLOSURE	iii
STATEMENT OF THE CASE	1
A. The Oil Companies' Formation Of and Control Over The Alliance	4
B. The Oil Companies' Pricing of Shell and Texaco Brand Gasoline	7
REASONS FOR DENYING THE WRIT	8
I. THE PREMISE OF THE OIL COMPANIES' ARGUMENT – THAT THE PRICING RESTRAINT AT ISSUE WAS ESTABLISHED BY A JOINT VENTURE – IS CONTRARY TO THE RECORD	9
II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH AND, INDEED, COMPELLED BY, THIS COURT'S PREVIOUS DECISIONS CONDEMNING NAKED PRICE RESTRAINTS AS ILLEGAL *PER SE*	13
A. This Court Has Consistently Condemned Naked Restraints on Price Competition as Illegal *Per Se*	13
B. There Is No "Circuit Split"	17
III. THE NINTH CIRCUIT'S DECISION DOES NOT THREATEN LEGITIMATE AGREEMENTS NECESSARY TO THE OPERATION OF JOINT VENTURES	19
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001) 18

Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) 13, 14, 17, 18

Citizens Publ'g Co. v. United States, 394 U.S. 121 (1969) 13, 16

Nat'l Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986) 17

NCAA v. Bd. of Regents, 468 U.S. 85 (1984) 13, 14, 15, 21

Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985) 18

Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 3, 13, 14

United States v. Addiston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899) 3, 20

RULES AND STATUTES

Section 1 of the Sherman Act, 15 U.S.C. § 1 1

OTHER AUTHORITIES

H. Hovenkamp, *XI Antitrust Law*, Section 1908, at 228 (1998) 4, 20

P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues 37-38* (Federal Judicial Center, June 1981) 16

STATEMENT OF THE CASE

Respondents submit this brief in opposition to the Petitions for a Writ of Certiorari filed by Shell Oil Company ("Shell") and Texaco, Inc. ("Texaco") (collectively "the Oil Companies"). The petitions of Shell and Texaco should be denied because the question presented by Shell and Texaco does not exist and is not presented in the record of this case. The Ninth Circuit never ruled that the Oil Companies' joint ventures could not set the prices at which they sold their own products. Rather, the Ninth Circuit held that sufficient evidence existed to allow a jury to find that Shell and Texaco set prices for their joint ventures, and that such price-fixing by Shell and Texaco could constitute *per se* unlawful price-fixing.

The decision of the Ninth Circuit is fully consistent with the law of this Court and other circuits on the issue of when a price-fixing agreement by competitors engaged in a joint venture constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

To attract this Court's attention, Shell and Texaco have created a question that does not exist, and have misstated or ignored crucial aspects of the Ninth Circuit's decision, which demonstrate that there is nothing presented by this case that is worthy of this Court's attention.

First, Shell and Texaco incorrectly state that this case presents an issue of the ability of a joint venture to price its own products without running afoul of Section 1. They ignore the following two key factual findings made by the Ninth Circuit: (1) the evidence is sufficient to allow a jury to find that the decision to fix the same prices for the Shell and Texaco brands was made by Shell and Texaco themselves, and not by the management of their joint ventures

(Appendix at 19a)[1]; and (2) the evidence was also sufficient to allow a jury to find that the decision by Shell and Texaco to fix prices had absolutely nothing to do with the purposes for which they formed their joint ventures or any cost savings or efficiencies associated with those ventures. (Appendix at 23a.)[2]

Thus, in order to frame their question presented, Shell and Texaco ask this Court to assume propositions as to which the Ninth Circuit expressly found disputed issues of fact requiring trial. The question Shell and Texaco claim to present to this Court in their petitions for certiorari simply does not exist, because the Ninth Circuit expressly found that the price-fixing at issue was not the result of action "by a single economic entity," but was "a decision

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[1] Appendix citations in this brief in opposition are to the Appendix in the Petition of Texaco. The Ninth Circuit specifically found, at footnote 11 of its decision, "Thus, contrary to our dissenting colleague's understanding, the pricing decision was not made by a single economic entity. . . . At this stage of the litigation, we are required to draw all reasonable inferences in favor of the plaintiffs. Viewing the evidence in that light, there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the Alliance. The decision by Texaco and Shell to include in their joint ventures a unified pricing scheme was not a decision made by a single economic entity – it was a decision made by competitors."

[2] "The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies. Nor does the record contain facts sufficient to warrant our drawing any such inference. To the contrary, the record before us reveals that the Alliance never considered unified pricing to be relevant to product improvement or efficiency gains. As one oil company executive explained, all of the anticipated cost savings, which were calculated prior to the formation of the joint ventures, had 'nothing to do with pricing.'"

made by competitors" (Appendix at 19a), and was further wholly unrelated to the purpose or efficiencies of the subject joint ventures (Appendix at 23a).

Finally, this Court should deny the petitions because the analysis employed by the Ninth Circuit is entirely consistent with that employed by this Court and other circuits in analyzing whether price-fixing in a joint venture context is ancillary to the ventures and thereby lawful, or naked and thereby *per se* unlawful. The Ninth Circuit's decision presents a conventional and unremarkable application of a principle of antitrust law under Section 1 fully in accordance with more than a century of antitrust decisions in this Court and other circuits. The Ninth Circuit's decision creates no circuit split, no conflict with any decision of this Court, and no remarkable or unusual application of law meriting review by this Court.

Expressly noting this Court's admonition in *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) (" . . . [A]greements between legally separate persons and companies to suppress competition among themselves and others [cannot] be justified by labeling the project a 'joint venture'") (Appendix at 17a), the Ninth Circuit held, "Thus, whether the *per se* rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anticompetitive effects should be disregarded." (Appendix at 22a.) This is nothing more than a garden variety application of the rule condemning naked restraints, while allowing ancillary restraints, as articulated more than a century ago by Judge Taft in *United States v. Addiston Pipe & Steel Co.*, 85 F. 271, 280-81 (6th Cir. 1898), *modified and aff'd*, 175

U.S. 211 (1899). *See* H. Hovenkamp, *XI Antitrust Law*, Section 1908, at 228 (1998). If anyone seeks to change well-established law here, it is Shell and Texaco, not the Ninth Circuit. Accordingly, the petitions should be denied.

A. The Oil Companies' Formation Of and Control Over The Alliance

In March, 1996, Shell and Texaco began discussions regarding consolidating Shell's and Texaco's "downstream" assets in the United States.[3] Star Enterprise ("Star"), a joint venture of Saudi Refining, Inc. ("SRI") and Texaco doing business in the eastern United States, eventually joined the discussions. These discussions culminated on January 1, 1998, with the formation of Equilon, which combined the Shell and Texaco refining and marketing operations in the western United States, and, on July 1, 1998, with the formation of Motiva, which combined the refining and marketing operations of Shell, Texaco, and SRI in the eastern United States. (Appendix at 3-4a.) The Oil Companies have generally referred to the overall combination of Equilon, Motiva and related service companies as "the Alliance." (Appendix at 4a, n.2.)

Prior to the formation of the Alliance, competitors in the United States gasoline refining and marketing industry included, among others, six major oil companies (Shell, Texaco, Exxon, Mobil, Chevron, and Amoco), each of which had a relatively stable market share in the range of six to

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[3] In the oil industry, the refining of crude oil into gasoline and other products and the marketing of finished products are referred to as "downstream operations." "Upstream operations," in contrast, consist of exploring for and producing crude oil. (Appendix at 3a, n.1.)

eight percent. Shell, with a market share of eight percent, had annual revenues of $18.3 billion; Texaco, with a share of seven percent, had annual revenues of $18 billion. Prior to the formation of the Alliance, the Oil Companies' refining and marketing businesses were profitable, although the Oil Companies were dissatisfied with their rates of return. Even in the absence of the Alliance, each of the Oil Companies had planned to implement cost reductions in order to improve competitiveness and profitability in its downstream businesses. The Oil Companies also believed, however, that in the absence of a combination such as the Alliance, any cost savings they might achieve independently would not result in a sustainable increase in profitability, but rather, would be competed away. The Oil Companies' purpose in negotiating the formation of the Alliance was to end competition between Texaco, Shell, and SRI in the refining and marketing of gasoline in the United States and to increase the profitability of their refining and marketing businesses.

The Alliance was not a merger. Shell, Texaco, and SRI continued to exist as they had before the Alliance except for the specific downstream assets contributed to the Alliance. The Oil Companies were competitors before the Alliance, and they continued to be world-wide competitors after they formed the Alliance, except as specifically provided otherwise in written non-compete agreements. The Oil Companies excluded from the Alliance all of their international refining and marketing operations, thus limiting the Alliance's operations to the United States.

Perhaps most significantly, the Oil Companies also excluded the Shell and Texaco brand names and trademarks from the assets contributed to the Alliance, with

the ownership of the brands remaining with Shell and Texaco, respectively. The Alliance marketed the Shell and Texaco brands of gasoline under license agreements with Shell and Texaco. The license agreements were subject to "Brand Management Protocol" agreements, which required that both the Shell brand and the Texaco brand would be preserved, that the brands would be treated equally, and that neither brand would receive preferential treatment over the other brand. After the formation of the Alliance, use and management of the Shell and Texaco brands by Equilon and Motiva were subject to the oversight of the Brand Management Council, consisting of representatives of Shell and Texaco. Functions of the Brand Management Council included developing criteria and standards by which to measure performance of the brands and also ensuring that the Shell and Texaco brands received equal treatment.

At the time of its formation, the Alliance had a market share of approximately 15 percent of gasoline sales in the United States, double the size of its next largest competitor. In 39 states, the Alliance had a market share of more than 10 percent; in 15 of those states, its share exceeded 20 percent; in three states, the Alliance's market share was more than 30 percent. On the West Coast, its market share exceeded 25 percent.

The governance of the Alliance rested with Members Committees consisting of representatives of each of the Oil Companies. The Members Committee for Equilon consisted of four representatives from Shell and three from Texaco; the Members Committee for Motiva consisted of two members each for Shell, Texaco, and SRI. The Equilon Members Committee met six times per year; the Motiva

Members Committee met four times per year. The Members Committee representatives reported to executives at the Oil Company parents.

B. The Oil Companies' Pricing of Shell and Texaco Brand Gasoline

The Shell and Texaco brands of gasoline are separate and distinct products, each with its own unique package of additives. Moreover, the two brands are marketed to different customer segments. For example, Texaco customers tend to be more blue-collar and rural than Shell customers, who are more affluent and urban. Notwithstanding the differences between Shell and Texaco gasoline, Equilon and Motiva, within several months after their formation, implemented a practice of charging the same price for the Shell and Texaco brands of gasoline in each of the pricing areas into which Equilon and Motiva had divided their geographic spheres of operation. To that end, Equilon and Motiva developed a joint program called the "Strategic Marketing Initiative," which called for price-fixing as a means of "price optimization" and was reviewed and approved by the Members Committees of both Equilon and Motiva. As a result, price competition between the Shell and Texaco brands of gasoline ended.

Pursuant to the Strategic Marketing Initiative, the Oil Companies were able to increase prices to independent service station operators at a time when crude oil prices were falling to historic lows. For example, on September 1, 1998, the price of crude oil was stable at approximately $12 per barrel before declining to under $10 per barrel during January and February of 1999. During this same period, Equilon raised its prices for Shell and Texaco

gasoline from $.62 per gallon to $1.02 per gallon in Los Angeles and from less than $.60 per gallon to more than $.90 per gallon in Portland and Seattle. In the Chicago area, Motiva raised its prices from $.55 per gallon to $.75 per gallon. Generally, such increases occurred in areas where Equilon and Motiva had larger market shares, especially on the West Coast.

No efficiencies, cost savings, or synergies resulted from the Oil Companies' fixing of prices for the Shell and Texaco brands of gasoline. Cost savings both anticipated and realized from the formation of Equilon and Motiva resulted from the elimination of redundant operations, through layoffs, elimination of positions, and closing of offices, as well as by avoiding capital expenditures that the Oil Companies would have made had they continued as competitors. None of the cost savings were passed on to consumers in the form of price reductions. The pricing policies that are at issue in this case were not necessary to attain any of the cost savings or efficiencies that the Oil Companies expected or achieved from the formation of Equilon and Motiva. Nor did the formation of the Alliance result in the development of any new products or innovations that the Oil Companies could not have come up with individually, acting as competitors.

REASONS FOR DENYING THE WRIT

In an attempt to justify the application of the rule of reason rather than the *per se* rule against price-fixing, the Oil Companies characterize the pricing decisions at issue as decisions made by joint ventures in connection with the marketing of their products. This mischaracterizes the

record. In fact, the agreement to equalize the price at which the Alliance marketed the Shell and Texaco brands of gasoline was entered into and enforced by competitors, Shell and Texaco. As the Ninth Circuit concluded, "The decision by Texaco and Shell to include in their joint venture a unified pricing scheme was not a decision made by a single economic entity – it was a decision made by competitors." Shell and Texaco's pricing agreement was not necessary for the Alliance to be able to market gasoline, nor did it produce any efficiencies. As such, it was properly characterized as a "naked" restraint of trade and, based upon more than a hundred years of consistently applied antitrust jurisprudence, illegal *per se*.

I. THE PREMISE OF THE OIL COMPANIES' ARGUMENT – THAT THE PRICING RESTRAINT AT ISSUE WAS ESTABLISHED BY A JOINT VENTURE – IS CONTRARY TO THE RECORD

At issue in this case is the agreement of Shell and Texaco, as licensors of the competing Shell and Texaco brands of gasoline, that those brands would be sold by the Alliance at the same price. The Oil Companies' attempt to characterize this as a pricing decision made by the joint ventures is contrary to the record. For this reason, the question presented, as set forth in Oil Companies' respective petitions, is not an accurate statement of any legal issue presented by the Ninth Circuit's decision in this case.

To bolster their unfounded claim that the Ninth Circuit's decision improperly interferes with the right of the Alliance to price its own products, the Oil Companies ignore or misstate a number of key facts firmly established by the evidence of record. First, they ignore or misstate

their own significant continuing role in and control over the joint ventures during and after their formation. Shell and Texaco did not vanish and become absorbed in their new ventures, Equilon and Motiva. They continued to exist and compete with each other everywhere else in the world except the United States.[4] Here, they maintained not only their own separate corporate identities, but also their ownership and control over the Shell and Texaco brands of gasoline.[5] Equilon and Motiva were subject to Brand Management Protocols, under which Shell and Texaco licensed their brands while retaining control over how the Alliance could market the brands.[6] The brand management protocols further provided that the Alliance would treat the Shell and Texaco brands equally, and that neither brand would receive preferential treatment over the other.[7] Under their agreements, Shell and Texaco both maintained the ability to return to individual sales and marketing of their respective brands, pursuant to provisions in the joint venture agreements allowing for dissolution of the venture at any time by mutual consent or, after five years, by unilateral dissolution on two years' advance notice.[8]

Shell and Texaco agreed to price the Shell and Texaco brands of gasoline at the same price even though the two brands were maintained as distinct products, with each brand having its own unique chemical composition, trademarks, and marketing strategy, competing for customers

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[4] Appendix at 5a.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

"at the pump."[9] After the establishment of the Alliance, the Shell and Texaco brands continued to be targeted at different customer segments.[10]

Shell and Texaco agreed even before the ventures came into existence to eliminate all competition between their brands of gasoline, including, certainly by implication if not expressly, price competition. When the Alliance ultimately began marketing the two brands, their use and management of the brands were subject to the oversight of the Brand Management Council, which consisted of representatives of Shell and Texaco. The Brand Management Council's functions included monitoring that the Shell and Texaco brands were receiving equal treatment. Requiring equal treatment, by its very nature, precluded all competition between the brands, including price competition.

In addition, the overall management of Equilon and Motiva rested with Members Committees consisting of representatives of each of the participating oil companies. All venture business was required to be conducted "subject to direction by, and in accordance with policies, business plans and budgets approved by, the members, acting by and through the Members Committee." And it was, including specifically the decision to charge the same price for the Shell and Texaco brands in the same trade area. This practice was implemented by the Alliance under its "Strategic Marketing Initiative," which was reviewed with and approved by the Members Committees of Equilon and Motiva, *i.e.*, Shell and Texaco executives.

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[9] *Id.* at 6a-7a.

[10] *Id.* at 7a.

Thus, the price-fixing challenged in this action was clearly a decision of Shell and Texaco in their exercise of control over the operations of the venture, not an action of the venture itself.

In addition, the admissions of executives of Shell and Texaco established that the fixing of prices for the Shell and Texaco brands had absolutely no relationship with any efficiencies or cost-savings either anticipated or realized from the joint ventures.[11] Thus, the price-fixing was in no way reasonably necessary to further the legitimate aims of the joint venture, which were ostensibly cost reductions from combining the Shell and Texaco refining and marketing operations.

Based on these facts, the Ninth Circuit quite correctly rejected the claim that the pricing decision that is at issue here was made by a single economic entity. On this point the court found:

> At this stage of the litigation, we are required to draw all reasonable inferences in favor of the plaintiffs. Viewing the evidence in that light, there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance. The decision by Texaco and Shell to include in their joint ventures a unified pricing scheme was not a decision made by a single economic entity – it was a decision made by competitors.[12]

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[11] Appendix at 23a.

[12] Appendix at 19a.

Thus, the factual predicate for the issue claimed to be presented by the Oil Companies is unsupported by the record, and indeed directly contradicted by the Ninth Circuit's decision, which found sufficient evidence for a jury to conclude that the pricing decision at issue was made by Shell and Texaco, not by their joint ventures. The Ninth Circuit's finding renders the Oil Companies' petitions little more than impermissible requests for this Court to render an advisory opinion on a point the Ninth Circuit never decided, and in fact rejected, ruling that whether Shell and Texaco agreed to fix prices was a disputed question of fact requiring determination by a jury.

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH AND, INDEED, COMPELLED BY, THIS COURT'S PREVIOUS DECISIONS CONDEMNING NAKED PRICE RESTRAINTS AS ILLEGAL *PER SE*

A. This Court Has Consistently Condemned Naked Restraints on Price Competition as Illegal *Per Se*

The Ninth Circuit's decision follows directly from this Court's precedents regarding the application of the *per se* rule to naked restraints on price competition. Cases on which the Ninth Circuit properly relied include *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); and *Citizens Publ'g Co. v. United States*, 394 U.S. 121 (1969).

As this Court found in *Timken*, joint ventures do not enjoy any particular immunity from the antitrust laws.

See Timken, 341 U.S. 593, 598 (1951) ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.'"). This Court's teaching in *Broadcast Music* and *NCAA* shows that, even when competitors have, to some extent, integrated their operations in connection with the formation of a joint venture, it is still necessary to examine the relationship between the joint venture and any agreements that restrain competition.

In *Broadcast Music*, the Supreme Court declined to apply *per se* treatment to blanket licensing of musical works. The Court found the blanket license not to be a naked restraint "with no purpose except stifling of competition," but rather to accompany "the integration of sales, monitoring, and enforcement against unauthorized copyright use." 441 U.S. at 19-20. The Court noted, "The substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses." 441 U.S. at 21. Here, of course, the evidence is undisputed that the price-fixing at issue involved no reduction of costs whatsoever, and was not even claimed to be related to the cost reductions justifying the Oil Companies' ventures. The Supreme Court also observed in *Broadcast Music*, "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, *where the agreement on price is necessary to market the product at all.*" 441 U.S. at 23 (emphasis added). That is definitely not the case here, where no new product was involved; where for eight months after its formation Equilon was able to market the Shell and Texaco brands

without fixing their prices; and where no one has claimed price-fixing to be necessary to market the two brands.[13]

Significantly, in *NCAA v. Board of Regents,* 468 U.S. 85 (1984), this Court explained *Broadcast Music* by observing that price-fixing by joint ventures can escape *per se* treatment only when it makes "possible a new product by reaping otherwise unattainable efficiencies," 469 U.S. at 113; or when it "may be so efficient that it will increase sellers' aggregate output and thus be procompetitive." 468 U.S. at 103. Neither condition exists here, where the ventures themselves admittedly produced no new products, certainly not the products as to which Shell and Texaco fixed prices, the branded gasolines, and there is no evidence whatsoever of increased output resulting from the price-fixing.

Even more important, in *NCAA*, the Supreme Court quoted with approval the following comments of Professor Areeda, which clearly demonstrate the *per se* illegality of the restraint at issue here:

> . . . joint buying or selling arrangements are not unlawful *per se*, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling

[13] The Oil Companies belatedly made the unfounded claim that Robinson-Patman compliance prompted their price-fixing of the Shell and Texaco brands, a position the Ninth Circuit properly found to be without merit and no defense to their price-fixing. (Appendix at 24-26a.)

> will eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a procompetitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement "reasonable" under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.

468 U.S. at 110, 39, quoting P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues 37-38* (Federal Judicial Center, June 1981) (parenthetical omitted). The four conditions noted by Professor Areeda and quoted by the Supreme Court all apply to the Shell and Texaco ventures here and mandate *per se* illegality. Hence, under *BMI*, as well as *NCAA*, the Ninth Circuit's decision in this case scrupulously follows Supreme Court precedent.

Citizen Publ'g, which neither Texaco nor Shell effectively distinguishes, is even more on point. In that case, the Supreme Court found a joint venture between two Arizona newspapers to involve *per se* antitrust violations "plain beyond peradventure," 395 U.S. at 135, when the newspapers, retaining their corporate identities and separate news and editorial departments, combined their remaining operations, jointly fixed subscription and advertising rates, pooled profits, and agreed not to compete with each other. Just like the combining newspapers in *Citizen Publ'g*, here Shell and Texaco retained their corporate identities, as well as their exploration and production operations, while agreeing to fix prices for the gasoline marketed by their combination in the United States. The Ninth Circuit's decision here quite properly recognized the controlling weight of *Citizen Publ'g*, and

rejected the unpersuasive efforts of the Oil Companies to distinguish it.[14]

B. There Is No "Circuit Split"

In seeking to justify review by this Court, the Oil Companies attempt to manufacture some inconsistency between the Ninth Circuit's decision and decisions in other circuits. In fact, a review of the decisions that the Oil Companies rely on shows that the circuits, consistent with the decisions of this Court cited above, have repeatedly recognized the crucial distinction between ancillary restraints, which are subject to the rule of reason, and naked restraints, which are illegal *per se*. The Oil Companies' claims regarding the need to resolve a split among the circuits are without merit.

Nat'l Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986), one of the cases cited by the Oil Companies as evidence of a circuit split, is instructive. In that case, the plaintiff challenged under Sherman Act § 1 certain rates established for interbank credit card transactions. There the Eleventh Circuit applied this Court's analysis, as reflected in *Broadcast Music*, precisely in the way the Ninth Circuit did in this case, stating, "[*Broadcast Music's*] underlying teaching therefore appears to be that courts should look to whether the restraint at issue potentially could create an efficiency enhancing integration to which the restraint is ancillary. In other words, the issue is whether the price fixing '*achieves purposes unrelated to price formation.*'" 779 F.2d at 599 (emphasis in original, citations omitted). The court

[14] Appendix at 17a-20a.

went on to note, "Thus, if interchange reimbursement could be left to individual negotiation without threatening the existence and functioning of the VISA system, any effort to impose a set fee would be properly categorized as *per se* unreasonable. The question is whether the restraint is necessary for the existence of the product." *Id.* at 601.[15] Similarly, in *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001), another of the cases cited by the Oil Companies, the court found that the price restraint there, like the one in *Broadcast Music*, related to a joint offering that none of the participants in the venture could offer on its own. 269 F.3d at 48. *See also Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote," *citing NCAA*).

The situation presented by this case is, of course, very different from the one at issue in the cases cited by the Oil Companies. The agreement between Shell and Texaco to equalize the prices at which their respective brands of gasoline would be sold did not relate to any new, joint product; it related to the very same brands of gasoline that, before the implementation of the pricing restraint, competed with one another. The agreement was not necessary for the Alliance to be able to sell gasoline. To the contrary, as the Ninth Circuit observed, "[T]he

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[15] *Cf.* Appendix at 16a, citing *Broadcast Music* for the proposition that "joint ventures are not 'usually unlawful, at least not . . . where the agreement on price is necessary to market the product at all.'" (Emphasis in original).

defendants have stressed that, in addition to the differences in the product themselves, the gasolines marketed under the Texaco and Shell labels have different reputations and customer bases. It thus seems likely that independent price analysis would result, at least in some circumstances, in the rational decision to sell the different brands at different prices."[16] Finally, neither Shell nor Texaco has ever claimed that the pricing agreement was related to any efficiencies produced by the venture. Consistent with the decisions of this Court and every circuit, such a restraint is correctly characterized as "naked" and subject to the *per se* rule.

III. THE NINTH CIRCUIT'S DECISION DOES NOT THREATEN LEGITIMATE AGREEMENTS NECESSARY TO THE OPERATION OF JOINT VENTURES

In their petitions, the Oil Companies make the wholly unfounded and alarmist claim that the Ninth Circuit's decision has put in question and surrounded with doubt the future formation and operation of joint ventures in this country, and thereby threatens an important sector of the United States economy. This goes beyond hyperbole in that it contains not a grain of truth. There is nothing new, unexpected, or revolutionary in the lower court's decision, which rests on the most fundamental and well-established principles of antitrust law and analysis. If anything, the decision has made more secure the bedrock principles that guide a determination of when joint venture partners have transgressed into an area of *per se* illegality.

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[16] Appendix at 23a.

The guiding principle of the Ninth Circuit's opinion is clearly stated:

> It is not the case, however, that the mere existence of a *bona fide* joint venture means that participating companies may use the enterprise to do anything they please with full immunity from *per se* analysis under § 1, including price fixing. As the district court correctly stated when ruling on the motion to dismiss, the issue with respect to legitimate joint ventures is whether the price fixing is "naked" (in which case the restraint is illegal) or "ancillary" (in which case it is not). *Accord* XI Hovenkamp ¶1908, at 228-30 (arguing that a "restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful" and that "a restraint is not saved from the 'naked' classification simple because it is included in some larger joint venture arrangement that is clearly efficient").[17]

Significantly, the cited section of the Hovenkamp treatise premises its discussion on the rule formulated by Judge Taft in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280-81 (6th Cir. 1898), modified and affirmed, 175 U.S. 211 (1899), articulating the distinction between naked and ancillary restraints. H. Hovenkamp, *XI Antitrust Law*, ¶1908, at 228 (1998). Thus, the principle guiding the decision has been a cardinal rule of antitrust law for well over a century. Since 1899, the distinction between naked and ancillary restraints has served as a touchstone for joint ventures in determining the conduct

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[17] Appendix at 16a.

that will be subject to *per se* illegality. For the Oil Companies to argue that the Ninth Circuit's decision did anything new or unprecedented in following this rule is absurd.

Moreover, the decision's actual application of this guiding principle is entirely unexceptionable and in conformance with precedent. According to the Ninth Circuit, even if the Oil Companies' ventures themselves were not anticompetitive or formed with the intent to destroy competition, the relevant inquiry is "whether the defendants' conduct – setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors – is reasonably necessary to further the legitimate aims of the joint venture."[18]

In making this analysis, the Ninth Circuit did nothing more than follow the reasoning of *Broadcast Music*, "(approving an otherwise invalid price restraint only because 'the agreement on price is necessary to market the product at all')," and *NCAA v. Board of Regents*.[19] Accurately summarizing the record, the court concluded, "The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies."[20] "Indeed," the court noted, "the record is close to establishing that the price fixing scheme was sufficiently unrelated to accomplishing the legitimate objectives of the joint venture

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[18] Appendix at 21a.

[19] *Id.*

[20] Appendix at 23a.

as to justify granting the plaintiffs' motion for summary judgment."[21] There is absolutely nothing new or unorthodox in the Ninth Circuit's treatment of the law and the evidence, and hence nothing to create fear, uncertainty, or doubt in the minds of companies contemplating or operating legitimate joint ventures.

Finally, the Ninth Circuit convincingly puts to rest the Oil Companies' arguments that its decision somehow blocks joint ventures from setting prices for their products.

> We have held that the Sherman Act's *per se* rule applies when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture – a relationship that justifies the otherwise prohibited price restraints. Thus far in this litigation, the defendants have failed to produce sufficient evidence demonstrating that the price fixing scheme was ancillary rather than naked and, thus, that they are entitled to summary judgment.[22]

The Oil Companies here are trying to turn their own failure of proof into a new rule of law, directly in conflict with all prior decisions in this area, which will confer on joint ventures a broad antitrust immunity they have never enjoyed and do not deserve. The Ninth Circuit's decision does not change the rules. The rules have been what they are since 1899. Joint venturers have only to look at a century of consistently decided cases and the Ninth Circuit's decision to know what they can and cannot do.

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[21] *Id.*, n.16.

[22] *Id.* at 27a.

CONCLUSION

The Ninth Circuit's decision in this case presents the straightforward application of well-established precedent holding naked restraints on trade to be illegal *per se*. This case does not present any new or novel issues warranting this Court's review. When the Oil Companies petitioned for *en banc* rehearing in the Ninth Circuit, "no judge ... requested a vote on whether to rehear the matter *en banc*." (Appendix at 1a.) The Oil Companies now come before this Court presenting a question that was neither considered nor decided by the Ninth Circuit, which found the evidence to be contrary to the position espoused by the Oil Companies. Accordingly, respondents respectfully request that the petitions of Shell and Texaco for a writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 STATEMENT

Petitioner's corporate disclosure statement is set forth at page ii of the petition for certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

Page

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

I. THE NINTH CIRCUIT'S DECISION RAISES THE QUESTION PRESENTED IN SHELL'S PETITION 1

II. RESPONDENTS OFFER NO SUBSTANTIVE RESPONSE TO THE REASONS FOR GRANTING REVIEW SET FORTH IN THE PETITION 3

A. The Ninth Circuit's Decision Conflicts With Decisions by This Court and Other Circuits With Respect to What Constitutes a Naked Price-Fixing Agreement 3

B. The Decisions Cited by Respondents Do Not Support Their Position 6

C. The Ninth Circuit's Decision Puts Virtually All Joint Ventures at Risk of *Per Se* Liability 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Augusta News Co. v. Hudson News Co.,
269 F.3d 41 (1st Cir. 2001).....2, 4, 6, 8

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.,
441 U.S. 1 (1979).....6, 7, 8

Citizens Publ'g Co. v. United States,
394 U.S. 131 (1969).....7

National Bancard Corp. v. Visa U.S.A., Inc.,
779 F.2d 592 (11th Cir. 1986).....2, 4, 6

NCAA v. Board of Regents of the Univ. of Oklahoma,
468 U.S. 85 (1984).....2, 7, 8

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,
472 U.S. 284 (1985).....8

Polk Bros., Inc. v. Forest City Enterprises, Inc.,
776 F.2d 185 (7th Cir. 1985).....4

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986).....4, 8

Timken Roller Bearing Co. v. United States,
341 U.S. 593 (1951).....7

United States v. Addyston Pipe & Steel Co.,
85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).....3

United States v. Topco Assocs.,
405 U.S. 596 (1972).....7, 8

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Antitrust Guidelines For Collaboration Among Competitors, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) 5

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE NINTH CIRCUIT'S DECISION RAISES THE QUESTION PRESENTED IN SHELL'S PETITION.

Respondents' primary argument against review rests on the baseless claim that "the question presented by Shell ... is not presented in the record of this case." Br. in Opp. 1. Respondents ground this claim on the Ninth Circuit's holding that the pricing decision at issue here might be characterized as having been made by the joint venture partners, Shell and Texaco, rather than by "a single economic entity" (*i.e.*, the joint venture itself). Br. in Opp. 1-2. This is nothing more than a semantic game. If it suits their purposes, antitrust plaintiffs can attempt to characterize virtually any action taken by a joint venture as action taken by the joint venture partners, just as Respondents have here. *See* Br. in Opp. 12 ("the price-fixing challenged in this action was clearly a decision of Shell and Texaco in their exercise of control over the operations of the venture"). But this characterization has no bearing on the issue raised in Shell's petition, which challenges the Ninth Circuit's decision to apply the *per se* rule rather than the rule of reason.

Respondents predicate their semantic claim on the Ninth Circuit's statement, in a single footnote, that "there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance." Pet. App. 20a n.11. Respondents contend that, in light of this "factual issue," the pricing decision challenged here might be characterized as having been made by Shell and Texaco through agreement rather than by Equilon itself. But even if Equilon's price setting could be viewed as an "agreement" between Shell and Texaco, the question remains whether the *per se* rule may properly be applied to that

agreement. As Shell has demonstrated, the decisions of this Court and other circuits squarely hold that pricing decisions regarding the output of a joint venture are not subject to *per se* condemnation regardless of whether those decisions are characterized as having been made by the venture or by the venture partners.

Respondents do not address any of the cases cited by Shell on this point. For example, in *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984), this Court declined to apply the *per se* rule to a horizontal agreement on prices that had been adopted, not by a separate management entity, but by a vote of the individual members of the NCAA. *Id.* at 89-104. Similarly, in *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986), the Eleventh Circuit refused to apply the *per se* rule to a uniform pricing system adopted by a vote among the competing members of the Visa joint venture. *Id.* at 593-603. And in *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001), the plaintiff challenged a joint venture's practice of paying up-front fees to chain retailers. The court stated that the members of the joint venture "might be viewed as acting through [the joint venture] to 'agree' on up-front payments to the buyers" but held the *per se* rule inapplicable because that "agreement" was ancillary to a legitimate joint venture. *Id.* at 48. As these and the other cases cited in Shell's petition demonstrate, courts have consistently refused to apply the *per se* rule to pricing decisions concerning the output of a legitimate joint venture, regardless of whether those pricing decisions were made by the joint venture itself or by the joint venture partners.

In short, the issue raised in Shell's petition does not represent a "reques[t] for this Court to render an advisory opinion on a point the Ninth Circuit never decided," as Respondents wrongly assert. Br. in Opp. 13. The Ninth Circuit squarely held that the pricing "agreement" challenged

here may be subject to the *per se* rule, and that holding warrants this Court's review.

II. RESPONDENTS OFFER NO SUBSTANTIVE RESPONSE TO THE REASONS FOR GRANTING REVIEW SET FORTH IN THE PETITION.

The Ninth Circuit's decision conflicts directly with decisions by other circuits and this Court with respect to what constitutes a naked as opposed to an ancillary restraint. Moreover, the Ninth Circuit's decision, if upheld, would potentially render it *per se* illegal for any joint venture to set the prices of multiple products or services – a result that is already engendering widespread confusion and uncertainty on an issue with national economic repercussions.

A. The Ninth Circuit's Decision Conflicts With Decisions by This Court and Other Circuits With Respect to What Constitutes a Naked Price-Fixing Agreement.

Contrary to Respondents' Opposition (Br. in Opp. 17), the circuit conflict that the Ninth Circuit's decision has spawned is both real and readily apparent. Of course, Respondents are correct that there is no conflict about the existence of a "crucial distinction between *ancillary* restraints, which are subject to the rule of reason, and *naked* restraints, which are illegal *per se*." Br. in Opp. 17 (emphasis added). As Respondents note, the distinction between the two has been around for more than 100 years. Br. in Opp. 20-21 (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)). The circuit conflict created by the Ninth Circuit's decision concerns not whether a distinction exists but instead what constitutes a naked as opposed to an ancillary restraint.

Courts have uniformly held that an agreement between joint venture partners on the price to be charged for the venture's output is an ancillary restraint, so long as the joint venture is a

legitimate, economically integrated entity and the agreement on price does not extend to any *non*-venture output. *See* Pet. 8-9 (discussing *Augusta News* and *National Bancard*). Both conditions are met here. There is no dispute that Equilon was a *bona fide*, economically integrated joint venture. The district court found that Equilon and Motiva "were plainly not 'fly-by-night' operations designed to cover up an elaborate price-fixing scheme," and the Ninth Circuit agreed that the ventures were a true integration of risks and rewards, conceived for the procompetitive purpose of creating more than $800 million in cost savings and operating efficiencies. Pet. App. 3a, 8a. It is also undisputed that the pricing "agreement" challenged here involved only the pricing of venture output – that is, products that were indisputably manufactured and owned by Equilon. Indeed, the joint ventures were approved by the Federal Trade Commission and several state Attorneys General after a lengthy antitrust review, with full knowledge that each joint venture (rather than a single joint venture partner) would control the pricing of the venture's output.

In light of these undisputed facts, the pricing agreement challenged by Respondents was unquestionably an ancillary restraint subject to rule-of-reason analysis. The circuits have generally defined a restraint as ancillary "when it may contribute to the success of a cooperative venture that promises greater productivity and output" (*Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985)), or when the restraint is "subordinate and collateral to a separate, legitimate transaction … in the sense that it serves to make the main transaction more effective in accomplishing its purpose" (*Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986)). An "agreement" on the price to be charged for Equilon's products – whether that agreement is express or merely attributable to Shell and Texaco based upon their oversight or "control" of Equilon – was indisputably necessary to make Equilon "more effective

in accomplishing its purpose." *Id.* Without an agreement on *some* price for Equilon's products, those products could not have been marketed at all.

The Ninth Circuit nonetheless branded the pricing agreement at issue in this case a "naked" restraint potentially subject to *per se* condemnation, in direct conflict with the decisions Shell has cited. The court did so based solely on the fact that the two brands of gasoline were priced the same (a point addressed below) and the irrelevant fact that Equilon did not create a "new" product or merge the two existing brands into "one collective brand." *See* Pet. 16-17. Respondents' Opposition leaves this clear circuit conflict entirely unaddressed.

Respondents also leave entirely unaddressed the conflict between the Ninth Circuit's decision and the guidelines promulgated by the agencies of the federal government responsible for overseeing enforcement of the antitrust laws. Respondents make no attempt to reconcile the Ninth Circuit's decision with the principles articulated in the *Collaboration Guidelines*, nor could they. Under the *Collaboration Guidelines*, the joint pricing of venture output would have been reviewed under the rule of reason because it was "reasonably necessary" to achieve the procompetitive benefits of an "efficiency-enhancing integration of economic activity." *Collaboration Guidelines* § 3.2. The Ninth Circuit's invocation of the *per se* rule is in direct conflict with this standard and casts substantial doubt on the legality of a joint venture that the Federal Trade Commission itself expressly upheld as lawful. As a result, if there is any doubt about the extent to which the decision below warrants review, the Court should request the views of the Solicitor General on that question.

Respondents attempt to side-step these obvious conflicts by erroneously assuming (as did the Ninth Circuit) that the relevant "agreement" here was the decision to set the *same* price for both brands of gasoline. *See* Br. in Opp. 18

(focusing on the "agreement between Shell and Texaco to equalize the prices at which their respective brands of gasoline would be sold"). Like the Ninth Circuit, Respondents contend that Shell and Texaco were required to show that an agreement to "equalize" the prices for both brands of gasoline was *itself* necessary to achieve the joint venture's efficiencies. The Ninth Circuit's holding on this point is fundamentally wrong and conflicts with decisions of this Court and other circuits as well.

No court has ever held that the *specific price* chosen for a joint venture's products must be reasonably necessary to the venture's success in order for a pricing restraint to be deemed ancillary rather than naked. As Shell demonstrated in its petition, the Ninth Circuit's imposition of such a requirement is flatly inconsistent with this Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979), and the decisions of the First and Eleventh Circuits in *Augusta News* and *National Bancard*. *See* Pet. 12, 14. In each of those cases, the courts asked only whether the decision to agree on *some price* was reasonably necessary to achieve the efficiencies of the venture, not whether the specific price chosen by the joint venture was reasonably necessary. The Ninth Circuit's decision thus dramatically expands the category of restraints that may be subject to *per se* condemnation, again in direct conflict with the decisions Shell has cited. Respondents offer absolutely no response to this point, which stands unrebutted.

B. The Decisions Cited by Respondents Do Not Support Their Position.

Respondents rely on four decisions by this Court in support of their argument that unified pricing of Shell- and Texaco-branded gasoline can be deemed a naked restraint because it was not "necessary" to price the brands the same in order to achieve the joint venture's efficiencies. *See* Br. in Opp. 13-

17. None of the cited cases actually supports Respondents' position.

In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), the Court applied the *per se* rule only because the purported "joint venture" was a mere sham designed to mask a naked horizontal agreement to allocate territories. *Id.* at 597. Here, it is undisputed that the joint ventures were *bona fide*. *See* Pet. App. 3a ("There is a voluminous record documenting the economic justifications for creating the joint ventures."). In *Broadcast Music*, the Court refused to apply the *per se* rule to the joint ventures' pricing of their blanket licenses, not because the setting of any particular price was necessary to achieve efficiencies, but because the joint ventures themselves created efficiencies and the ventures could not function without setting *some* price for their products. Similarly, in *NCAA*, the Court declined to apply the *per se* rule, not because the alleged *pricing* restraint "[made] possible a new product by reaping otherwise unattainable efficiencies," 468 U.S. at 113, or "may be so efficient that it will increase sellers' aggregate output and thus be procompetitive," *id.* at 103. Rather, the Court declined to apply the *per se* rule simply because the existence of the joint entity involved there (the NCAA) had that result and the pricing restraint was related to the operation of the entity. The same is true here.

In *Citizens Publ'g Co. v. United States*, 394 U.S. 131 (1969), unlike here, the formation of the joint venture did not eliminate competition between the two newspapers in all respects, because each retained its own news and editorial departments. *Id.* at 133. Moreover, to the extent that the 1969 *Citizens Publishing* opinion held that the *per se* rule applied to pricing restraints adopted in the context of an otherwise legitimate joint venture, the opinion was merely a precursor to the now-overruled doctrine of *United States v. Topco Assocs.*, 405 U.S. 596 (1972); as such, it is inconsistent with subsequent decisions by this Court with respect to the

proper scope of the *per se* rule, as several circuits have implicitly recognized. *Augusta News*, 269 F.3d at 48 (noting that, notwithstanding *Topco*, "it is commonly understood today that *per se* condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture"); *Rothery Storage*, 792 F.2d at 224-29 (recognizing that *Topco*'s holding that all horizontal restraints are illegal *per se*, even if they are ancillary to a partnership or joint venture, has been overruled by this Court's decisions in *Broadcast Music*, *NCAA*, and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985)).

Perhaps most telling is Respondents' misplaced reliance on the comments of Professor Areeda that this Court quoted in *NCAA*. Br. in Opp. 15-16. Professor Areeda's comments, cited with approval by this Court, affirmatively demonstrate that the restraint at issue here is *not* illegal *per se*. In the quoted passage, Professor Areeda hypothesizes a joint venture in which the two dominant automobile manufacturers (undoubtedly holding a combined market share well in excess of 50%) agree to distribute their automobiles through a single selling agent but not otherwise to integrate their businesses. Notwithstanding that those two joint venture partners would certainly have more market power than Shell and Texaco, and notwithstanding the far more limited scope of the joint venture (and hence of any likely efficiencies), Professor Areeda makes clear that the "price fixing" that arose from his hypothetical venture would be subject to the rule of reason, *not* the *per se* rule. This case is a far easier one for rejection of the *per se* rule.

C. The Ninth Circuit's Decision Puts Virtually All Joint Ventures at Risk of *Per Se* Liability.

Respondents' two attempts to minimize the import of the Ninth Circuit's decision fall flat. First, Respondents suggest that the ruling applies only where the joint venture partners,

rather than the joint venture, decide what prices will be charged for the venture's products. Second, Respondents suggest that the ruling applies only where the *same* price is established for more than one product. For the reasons stated above, neither purported limitation is consistent with the decisions of this Court and other circuits, and neither could be relied upon by prospective joint venture partners in forming or implementing an efficiency-enhancing venture.

With respect to the identity of the decision-maker, plaintiffs in other cases will undoubtedly argue – exactly as Respondents have here – that decisions by a joint venture should be attributed to the joint venture partners. To the extent that the partners retain any control or oversight of the management of their venture (as is usually the case), the distinction between decisions by the "joint venture" and by the "joint venture partners" will likely not be a distinction upon which lawyers will feel safe in advising their clients to rely. Companies considering whether to form joint ventures will therefore be forced to assume that any pricing (and other) decisions might be attributed to them as individual competitors rather than to the joint venture. That will have a chilling effect on the formation of joint ventures.

To the extent that the Ninth Circuit's ruling turns on Equilon's decision to charge the *same* price for Shell- and Texaco-branded gasoline, the decision makes no economic or legal sense. As explained in Shell's petition, it would be just as anticompetitive, and just as much *per se* illegal price fixing, for two competitors to agree that one will charge $2.00 for its product while the other charges $1.00 as it would be for both of them to agree to charge $1.50. Thus, under the Ninth Circuit's reasoning, if it is *per se* illegal for joint venture partners to agree to charge the *same* price for two products, it will similarly be *per se* illegal for them to agree to charge two *different* prices for those products as well.

The Ninth Circuit's decision sweeps even more broadly by requiring joint ventures to establish that the *specific* prices

chosen for their products were themselves necessary to achieve the venture's efficiencies in order to avoid *per se* liability. This requirement will severely chill the formation of joint ventures, because the efficiencies generated by such ventures usually arise, not from specific pricing decisions, but, as here, from the consolidation of functions (including the pricing function) and resulting cost savings. If not overturned by this Court, the Ninth Circuit's decision will therefore put at risk of *per se* price-fixing liability every joint venture that sells products that would, if sold by economically separate entities, be competing products.

The *amicus* briefs submitted in support of the petitions for certiorari explain in detail the havoc the Ninth Circuit's decision will create in an important sector of the national economy. *See, e.g.*, Brief of Antitrust Scholars as *Amici Curiae* 18-20. The potentially broad and highly disruptive impact that the Ninth Circuit's decision will have on the formation of procompetitive business enterprises further confirms that review is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 04-805 and 04-814

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In The
Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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TABLE OF AUTHORITIES

Page

CASES

Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001) 6

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) 3, 4, 5, 6

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) 9, 10

Dagher v. Saudi Refining, Inc., 369 F.3d 1108 (9th Cir. 2004) ..... *passim*

Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 449 (1992) 2

F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 3, 5

Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002) 6

Freeman v. San Diego Bd. of Realtors, 322 F.3d 1133 (9th Cir. 2003) 6, 9

National Bancard Corp. v. Visa U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986) 5, 6

National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) 3, 5

NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984) 3, 4, 8

Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985) 5

TABLE OF AUTHORITIES – Continued

Page

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) 5

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899) 9

RULES AND STATUTES

Section 1 of the Sherman Act, 15 U.S.C. § 1 ..... *passim*

OTHER AUTHORITIES

Bruce D. Sokler, Yee Wah Chin & Kathryn E. Walsh, *A Consideration of Dagher and the Antitrust Standard for Joint Ventures*, 1 NYU Journal of Law and Business 307 (2004) 6

H. Hovenkamp, *XI Antitrust Law*, 2d ed., Section 1908b (2005) 6, 9

P. Areeda, *The Rule of Reason, Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981) 8

Respondents above-named (hereafter "respondents" or "plaintiffs") submit this supplemental brief in response to the brief for the United States as *amicus curiae* ("United States brief"), which advocates that this Court accept certiorari for the purpose of reversing the decision of the court of appeals in this case.

The Government urges this Court to accept certiorari because the Government claims that the lower court's decision is an "unwarranted expansion of the per se rule" (United States brief, p. 19), which "upsets the previously settled understanding of the scope of per se liability" (*id.*, p. 7), and "chills legitimate and beneficial economic activity by raising the specter of per se liability for efficiency-enhancing joint ventures" (*id.*, p. 17). These contentions are wrong.

The principal problem with the Government's position is that, in order to criticize the court of appeals decision, the Government assumes as true a critical fact in this case, which the petitioners have not only failed to prove, but also affirmatively disclaimed and denied. Repeatedly, throughout its brief, the Government asserts that the price restraint at issue in this case, petitioners' fixing the same price for the Shell and Texaco brands, was "integral" to their joint ventures. (*Id.*, pp. 15, 16, 18, 20 n.1.)

A basic, crucial, and unrefuted fact of this record, however, is that petitioners never claimed that their ventures' identical pricing of the Shell and Texaco brands was integral to the ventures' operations or alleged efficiencies. It was instead a direct restraint on price for which they claimed *no* procompetitive justification. The court of appeals specifically found, "The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline serves to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies. Nor does the record contain facts sufficient to warrant our drawing any such inference." *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108,

1122 (9th Cir. 2004).[1] For the Government to claim otherwise and maintain that the pricing restraint at issue was "integral" to the ventures' operations is flatly contradicted by the voluminous evidence of record.[2] The Government's entire argument thus rests on a theoretical premise that is contradicted by extensive evidence of record from the mouths of the oil companies' own top executives. As this Court has said, "Legal presumptions that rest on formalistic distinctions, rather than actual market realities, are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 449, 466-67 (1992).[3]

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[1] Executives of Shell, Texaco, and both ventures all testified that setting the same price for the Shell and Texaco brands had *absolutely nothing* to do with any claimed efficiencies, competitive benefits, or purposes of the ventures. (*See* deposition testimony of Messrs. Bijur, Tilton, Darnley, Burch, Williams, and Berry in Supplemental Brief Appendix ("App."), pp. 1-12, attached hereto.)

[2] This evidence was in fact provided to the Government by respondents on January 18, 2005. *See* e-mail from respondents' counsel to Antitrust Division enclosing "materials from the Ninth Circuit record showing the testimony that price-fixing had nothing to do with the claimed efficiencies of the joint ventures, and that any cost savings were not passed on to consumers." (App., pp. 13-14, attached hereto.)

[3] Although this is the Government's most crucial misreading of the record, it is not the only one. For example, the Government asserts that respondents constitute "a class of 23,000 gas station owners in the western United States" (United States brief, p. 1); and that "the dispute before this Court involves Equilon, which petitioners formed to own and operate their downstream assets in the western United States," (*Id.*, p. 2), because "the district court granted petitioners summary judgment on all claims related to Motiva . . . " (*Id.* n.3.) The Government is wrong in all particulars. Respondents consist of a *nation-wide* class of Shell and Texaco dealers; the lawsuit involves the oil companies' price fixing for both Equilon and Motiva; and the summary judgment affirmed by the court of appeals relates only to the presence of Saudi Refining, Inc., as a defendant in this action, and not to price fixing by Shell and Texaco with regard to gasoline sales by Motiva. *Dagher*, 369 F.3d at 1110, 1114-16. Likewise, the Government asserts, "Respondents contended that the agreement constituted a per se violation of Section 1 of the Sherman

(Continued on following page)

The Government's false premise that the pricing restraint at issue was "integral" to the joint ventures wholly vitiates and undermines the Government's argument for granting certiorari. In this case, which admittedly involves a direct restraint on price, not only have the oil companies acknowledged that the restraint was not integral to their ventures; they have also presented *no* evidence of a procompetitive justification for the restraint. In every case in which this Court has considered the lawfulness of a restraint imposed by a joint venture or other collaboration of competitors, this Court has required a showing of procompetitive benefits in order to sustain the lawfulness of the restraint. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-24 (1979); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 103-04, 109-10 (1984); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690-95 (1978); *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459-61 (1986).

In *Broadcast Music*, this Court denied *per se* treatment for blanket licensing of musical compositions, because the Court found that blanket licensing was integral to creation of "a different product," which carried with it substantial procompetitive benefits. 441 U.S. at 22-23. This Court observed, "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." 441 U.S. at 23.

Act, 15 U.S.C. 1." (United States brief, p. 2.) This ignores that respondents also premised their "claim on either a *per se* rule or a 'quick look' theory of liability." *Dagher*, 360 F.3d at 1113. The Government claims, further, that the oil companies "transferred all of their domestic downstream assets" to their joint ventures. (United States brief, p. 2.) The Government neglects to mention, however, that "Each [oil company] retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand. Under the joint venture agreements, Equilon and Motiva market Shell and Texaco gasoline under licensing agreements governing both the sale of the products and the use of the Shell and Texaco trademarks." 369 F.3d at 1112.

Here, Shell and Texaco themselves have disclaimed any such necessity for charging the same price for their brands. Moreover, the Shell and Texaco ventures produced no new product, as did ASCAP and BMI, and virtually every other joint venture whose practices have been found lawful under the antitrust laws.

In *NCAA v. Board of Regents*, in holding restraints on the televising of college football to be in violation of Section 1 under a quick look rule of reason, this Court expressly stated that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." 468 U.S. at 110. Likewise, in an accompanying footnote, the Court stated:

> The Solicitor General correctly observes:
>
> "There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found . . . the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. *Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. . . .*" [*Id.*, n.42; emphasis added.]

Here, in supporting a naked restraint on price for which no procompetitive justification is offered, the Government takes exactly the opposite position.[4]

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[4] Also in *NCAA*, this Court provided the following gloss on its decision in *Broadcast Music*:

> While joint ventures have no immunity from the antitrust laws, as *Broadcast Music* indicates, a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies."
>
> • • •

(Continued on following page)

In *Indiana Fed'n of Dentists*, this Court again expressly required a procompetitive justification for a restraint on price or output:

> Absent some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, *see Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra*; *Chicago Board of Trade, supra; cf. National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) – such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place," *National Society of Professional Engineers, supra*, 435 U.S. at 692, 98 S. Ct., at 1365, cannot be sustained under the Rule of Reason. [476 U.S. at 459.]

In *National Soc'y of Prof'l Eng'rs*, this Court also required that any restraint on price or output be justified by a showing of competitive benefits, and said that not doing so while arguing that competition itself was inadvisable was "nothing less than a frontal assault on the basic policy of the Sherman Act." 435 U.S. at 695.

Every significant lower court joint venture decision has followed this Court's directive in requiring a procompetitive justification for restraints on price and output, generally by requiring a showing that any such restraint is ancillary, rather than naked, in the sense that it is reasonably necessary to achieving the efficiencies, benefits, or purposes of the joint venture at issue. *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214, 224, 229 (D.C. Cir. 1986); *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592,

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> In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold.

468 U.S. at 113-14 (footnote omitted). As indicated, the Shell and Texaco ventures produced no new product.

599, 601, 603 (11th Cir. 1986); *see Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002); *Freeman v. San Diego Bd. of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003). This, of course, is exactly the approach followed by the court of appeals in this case. The Government is simply wrong in contending that "[t]he court of appeals compounded its error by applying the ancillary restraints doctrine to this case." (United States brief, p. 13.) *See* H. Hovenkamp, *XI Antitrust Law*, 2d ed., Section 1908b at 253 (2005):

> **Relevance of inclusion in presumptively efficient joint venture or other transaction.** Determining ancillarity requires the tribunal to consider *first* whether any aspect of the defendants' association contains a significant promise of integration or cooperation yielding an increase in output. *Second*, some determination must be made whether the challenged agreement is an essential part of this arrangement, whether it is important but perhaps not essential, or whether it is completely unnecessary.

The Government goes even further astray, urging a doctrinal distinction that does not exist in the case law when it claims that "the court of appeals' decision in this case is the first ruling to apply the ancillary restraints doctrine to constraints on the joint venture's *own* conduct." (United States brief, p. 15, emphasis in original.) To the contrary, the ancillary restraints doctrine has routinely been applied to restraints within joint ventures. *See Broadcast Music, Inc.*, 441 U.S. at 19-24; *Freeman v. San Diego Bd.*, 322 F.3d at 1151; *National Bancard v. Visa*, 779 F.2d at 599, 601, 603.

Moreover, current scholarship regards the court of appeals decision "as a case that applies these generally accepted standards," which "was correctly decided on its current record and should not be considered controversial. It provides helpful guideposts to the types of joint venture activities that trigger antitrust concerns." Bruce D. Sokler, Yee Wah Chin & Kathryn E. Walsh, *A Consideration of Dagher and the Antitrust Standard for Joint Ventures*, 1

NYU Journal of Law and Business 307, 321 (2004). This article further comments:

> In the case of joint venture pricing activities that are not properly ancillary to the venture's legitimate purposes, *per se* illegality may result. From this perspective, *Dagher* is in the mainstream of antitrust jurisprudence and breaks no new ground. The result in *Dagher* represents an unsurprising application of generally accepted antitrust standards to competitor joint ventures.
>
> * * *
>
> This reliance on fact-specific analysis in the overwhelming majority of cases ensures that beneficial economic activity is unlikely to be deterred by rigid rules of thumb. [*Id.*]

The evidence of record and all of the foregoing authorities show that there is no reason for this Court to grant certiorari to examine a pricing restraint by a joint venture that is neither integral to the venture's operation nor supported by any claimed procompetitive justification. Given the state of the record, the court of appeals holding that the pricing restraint can be *per se* illegal hardly constitutes an "unwarranted expansion of the per se rule," as the Government claims. The court of appeals quite properly concluded that the evidence of record allows a jury to find that Shell and Texaco imposed a direct restraint on the pricing of their brands of gasoline; that the restraint was not integral to the ventures or at all related to the purposes or claimed efficiencies or benefits of the ventures; and that the oil companies have shown no procompetitive justification for the restraint. On this evidence, there is nothing controversial or radical in the court of appeals holding that such a restraint can be subject to *per se* illegality.

Indeed, the issue in this case really is not whether to treat such a pricing restraint under the *per se* rule or the rule of reason, inasmuch as even the rule of reason requires a showing that the restraint at issue is incident to at least some procompetitive benefit. As this Court has

said, if there is a direct restraint on price, "some competitive justification" is required, and where it is not forthcoming, "the rule of reason can sometimes be applied in the twinkling of an eye." *NCAA*, 468 U.S. at 110, n.39, quoting from P. Areeda, *The Rule of Reason, Antitrust Analysis: General Issues*, 37-38 (Federal Judicial Center, June 1981).[5]

Here, however, Shell and Texaco have offered no procompetitive justification whatsoever for their pricing restraint on the Shell and Texaco brands. Hence, whether to apply the rule of reason or the *per se* rule is a non-issue, because Shell and Texaco have abjured proof of any competitive benefit, and their restraint is therefore unlawful whatever standard applies. Nor does the court of appeals decision here create any uncertainty for present or future joint ventures, contrary to the Government's hyperbole. The Government's brief is noteworthy for its failure to name a single joint venture that has demonstrated an actual adverse effect from the Ninth Circuit's decision.

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[5] [FN39.] "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful *per se*, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable' under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, *The Rule of Reason, Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981).

Professor Areeda's hypothetical is of course squarely on all fours with the facts of this case, where one need only substitute Shell and Texaco for Ford and General Motors.

Certainly, the Shell and Texaco ventures, which terminated in 2002, before the court of appeals decision, cannot claim uncertainty from the decision. Avoiding liability under the court of appeals decision requires no more than showing that any challenged pricing "is sufficiently important to attaining the lawful objectives of the joint venture that the anticompetitive effects should be disregarded." *Dagher*, 369 F.3d at 1121.[6] This is nothing more than what the law has always required, since *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899); *see* H. Hovenkamp, *XI Antitrust Law*, 2d ed., Section 1908b, at 253-59 (2005).

This case is simply not worthy of certiorari. There is no conflict between the Ninth Circuit's decision and any decision of any other circuit; the Government has shown no circuit split.[7] The decision of the court of appeals is also fully consistent with all prior decisions of this Court.[8] The

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[6] *See, also, Dagher*, n.14, citing, Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1188-89 (2001).

[7] Although the Government claims that joint venture decisions in other circuits "have required joint venture partners to demonstrate the reasonable necessity of restrictions on their own conduct outside the venture," (United States brief, p. 14), this is a claimed distinction that no court has ever articulated, to respondent's knowledge, and that the cases themselves fail to support. *E.g.*, *Freeman v. San Diego Bd.*, 322 F.3d at 1151.

[8] The Government's effort to distinguish *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) is both legally and factually unpersuasive. In *Citizen Publishing*, this Court affirmed summary judgment for the Government in a Section 1 challenge to a joint venture of newspapers in Tucson, Arizona. The newspapers had entered into a joint operating agreement, the salient features of which were described by the Court as follows:

> The purpose of the agreement was to end any business or commercial competition between the two papers and to that end three types of controls were imposed. First was price fixing. The newspapers were sold and distributed by the circulation department of TNI; commercial advertising placed in the papers was sold only by the advertising department of TNI; the subscription and advertising

(Continued on following page)

rule sought by petitioners and the Government – that price fixing by a joint venture requires no procompetitive justification – would create a sea change in Sherman Act Section 1 jurisprudence, establish a roadmap for price fixing, and undercut both private and public antitrust enforcement.[9]

On the other hand, if certiorari is denied, this case returns to the district court for trial and the development of a complete record, where, in accordance with more than a century of settled antitrust law, Shell and Texaco will have a full opportunity to show how their price fixing was integral or reasonably related to the claimed efficiencies or procompetitive aspects of their joint ventures (although the jury will of course be free to consider the disavowal of any such connection by all of their executives who have testified on the question).

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rates were set jointly. Second was profit pooling. All profits realized were pooled and distributed to the Star and the Citizen by TNI pursuant to an agreed ratio. Third was a market control. It was agreed that neither the Star nor the Citizen nor any of their stockholders, officers, and executives would engage in any other business in Pima County – the metropolitan areas of Tucson – in conflict with the agreement. Thus competing publishing operations were foreclosed.

394 U.S. at 134. This Court found the claimed Section 1 violations to be "plain beyond peradventure." 394 U.S. at 135-36. The Government argues that *Citizen Publishing* is distinguishable because the "agreement fixed prices and pooled profits for defendants' separately owned and produced news and editorial content." (United States brief, p. 13, n.12.) To the contrary, as this Court expressly stated, "Commercial advertising placed in the papers was sold only by the advertising department of" their joint venture, and "advertising rates were set jointly." 394 U.S. at 134. The Government is thus plainly wrong that *Citizen Publishing* is factually distinguishable. As the court of appeals correctly found, *Citizen Publishing* squarely applies and dictates the result in this case.

[9] The Government's position in this case, if adopted, could leave consumers without an antitrust remedy if the next oil company joint venture approved by the Government consists of three, four, or more major oil companies, who then decide to charge the same price for all their brands.

Dated: June 8, 2005

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INDEX TO APPENDIX

Govt. Opp. App. Page #

Excerpt from the Deposition of Peter Bijur, taken May 31, 2001, pp. 78, 81 ..... App. 1

Excerpt from the Deposition of Glenn T. Tilton, taken January 11, 2000, p. 93 ..... App. 3

Excerpt from the Deposition of John Darnley, taken February 16, 2001, p. 41 ..... App. 5

Excerpt from the Deposition of Larry Burch, taken February 20, 2001, pp. 42-43 ..... App. 7

Excerpt from the Deposition of Mark Williams, taken January 19, 2001, p. 26 ..... App. 9

Excerpt from the Deposition of Louis Wilson Berry, Jr., taken December 8, 2002, pp. 44-45 ..... App. 11

E-mail from Daniel R. Shulman, counsel for respondents, to Adam Hirsh, Antitrust Division, enclosing materials from the Ninth Circuit record ..... App. 13

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV-99-06114 GHK (JWJx)

FOUAD N. DAGHER, et al.,
Plaintiffs,

-vs-

SAUDI REFINING, INC., et al.,
Defendants.

DEPOSITION UPON ORAL EXAMINATION OF PETER BIJUR

TRANSCRIPT of the videotaped deposition of PETER BIJUR, called for Oral Examination in the above-entitled matter, said deposition being taken by and before LINDA BAYLES, a Certified Shorthand Reporter of the State of New Jersey, at the offices of CADWALADER, WICKERSHAM & TAFT, 350 Park Avenue, New York, New York, on May 31, 2001, commencing at 9:35 a.m.

* * *

[78] Q Did you discuss with Mr. Jum'ah or Mr. Carroll or Mr. Herkstrotter what the pricing would be under the alliance?

A Never.

Q Did the pricing have anything to do with the cost savings?

A No.

* * *

[81] A I just don't know. I don't know how to answer that question.

Let me say something here with respect to this because I think this is important.

All the synergies, all of the cost savings and the figures which we calculated had nothing to do with pricing, nothing.

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

. X

FOUAD DAGHER, et al,

Plaintiff,

-against-

CV-99-6114-GHK (MANx)

SAUDI REFINING, INC.,

Defendant.

. X

HELD AT: Texaco, Inc.
2000 Westchester Avenue
White Plains, New York
January 11, 2000 9:45 a.m.

Examination Before Trial of the Defendant, GLENN T. TILTON ON BEHALF OF TEXACO, INC., held pursuant to Agreement, at the above time and place, before a Notary Public of the State of New York.

* * *

[93] Q. And then the next page is, synergy opportunities by operations.

A. Correct.

Q. And it shows where the expected synergies are supposed to come from, right?

A. Correct. Correct.

Q. And if you look at the next page, the total of the synergies is expected to be about eight hundred million dollars.

A. That's correct.

Q. Okay. Are you aware of any cost savings or synergies that were anticipated as a result of charging the same prices for the brands in the same markets?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAGHER, ET AL	)	
	)	CASE NO.
vs.	)	CV99-06114 GHK
SAUDI REFINING, INC., ET AL	)	

ORAL VIDEOTAPED DEPOSITION
JOHN DARNLEY
February 16, 2001

ORAL VIDEOTAPED DEPOSITION OF JOHN DARNLEY, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on the 16th day of February, 2001, from 9:02 a.m. to 3:11 p.m., before Vickie G. Hildebrandt, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Equilon Services, L.L.C., 12700 Northborough Drive, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

* * *

[41] Q. Okay. Before you assumed your position, were you aware that work had been done by what's called the synergy team to analyze potential cost savings from the – if the alliance were formed?

A. I had heard and cannot remember any specific detail that there were – clearly one of the goals was to – to obtain cost savings from the creation of the alliance.

Q. Okay. And did you – did you learn that the – the parties believed there were potentially $800 million of cost savings to be realized from the formation of the alliance?

A. I heard that mentioned at a meeting, a large meeting with people and a number was – seems to approximate to that was mentioned.

Q. Okay. Now, are you aware of any potential cost savings that were anticipated from charging the same price for the Shell and Texaco brands in the – in the same markets?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAGHER, ET AL	)	
	)	CASE NO.
vs.	)	CV99-06114 GHK
SAUDI REFINING, INC., ET AL	)	

ORAL VIDEOTAPED DEPOSITION

LARRY BURCH

February 20, 2001

ORAL VIDEOTAPED DEPOSITION OF LARRY BURCH, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on the 20th day of February, 2001, from 10:09 a.m. to 4:21 p.m., before Vickie G. Hildebrandt, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Baker & Hostetler, L.L.P., 1000 Louisiana, Suite 2000, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

* * *

[42] Q. Right.

Okay. Let me show you what's marked as Exhibit 177. 177 – before I do that, there's something else I want to ask you.

When you – at the time you – just before you became the vice president of Motiva, after you learned you were

going to be, were you advised or did you become aware that one of the reasons for the [43] formation of the alliance was anticipated synergies or cost savings that would result from the alliance?

A. Yes.

Q. And did you hear the number $800 million?

A. Yes.

Q. Okay. Now – and you mentioned that after the alliance was formed – after Motiva was formed, you implemented this policy of charging the same price for the Shell and Texaco brands in the same area?

A. Yes.

Q. Okay. Was there any cost savings or synergy that resulted from doing that?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAGHER, ET AL	)	
	)	CASE NO.
vs.	)	CV99-06114 GHK
SAUDI REFINING, INC., ET AL	)	

ORAL VIDEOTAPED DEPOSITION
MARK WILLIAMS
January 19, 2001

ORAL VIDEOTAPED DEPOSITION OF MARK WILLIAMS, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on the 19th day of January, 2001, from 9:01 a.m. to 3:46 p.m., before Vickie G. Hildebrandt, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Fulbright & Jaworski, L.L.P., 1301 McKinney, 45th Floor, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

* * *

[26] Q. You also – in your speech, you said the synergy team, quote, "found astonishing synergies," end of quote. What did you mean by "synergies"?

A. Synergies were largely opportunities to – to reduce costs by putting the merger together or in some cases to – to increase revenue or to – to – to use our assets, dispose of redundant assets, for example, but most of the synergies were – were related to costs and efficiencies and they were simply done by, you know, an analysis of – of

how business was done in the – the existing companies and how might it be done differently in a merged company.

Q. Now, was there any discussion that any cost savings would result from charging the same price for the Shell and Texaco brands?

A. No. The synergy team got – never got into pricing.

Q. Are you aware of any cost savings that have resulted from charging the same prices for Shell and Texaco brands?

A. I couldn't say.

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FOUAD DAGHER, et al.	)	
	)	CV-99-6114-GHK (MANx)
vs.	)	
SAUDI REFINING, INC., et al.	)	

****

CONFIDENTIAL VIDEOTAPED DEPOSITION OF
LOUIS WILSON BERRY, JR.
December 8, 2000

****

VIDEOTAPED DEPOSITION OF LOUIS WILSON BERRY, JR., produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and numbered cause on the 8th day of December, 2000, from 9:26 a.m. to 4:55 p.m., before Lori O'Koren, CSR in and for the State of Texas, reported by machine shorthand, at the offices of Texaco, 1111 Bagby, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto. JOB NO. 01-48065

* * *

[44] Q. Now, one of the things that you – you mentioned that the synergy team looked at the possibility of cost savings resulting from the – from the alliance, right?

A. Uh-huh, yes.

Q. And that the cost savings were one of the [45] reasons for doing the alliance, right?

A. Uh-huh, yes.

Q. Are there any cost savings that you are aware of that are attributable to charging the same prices for the Shell and Texaco brands in the same pricing zones?

A. Not – not that I am aware of.

* * *

Schaub, Gayle M.

From: Shulman, Daniel R.
Sent: Wednesday, June 01, 2005 9:15 AM
To: Schaub, Gayle M.
Subject: FW: Shell/Texaco

----- Original Message -----

From: Adam.Hirsh@usdoj.gov
[mailto:Adam.Hirsh@usdoj.gov]
Sent: Tuesday, January 18, 2005 4:34 PM
To: Shulman, Daniel R.
Subject: RE: Shell/Texaco

Thanks, Dan. Yes, I will circulate to everyone here.

----- Original Message -----

From: Daniel.Shulman@gpmlaw.com
[mailto:Daniel.Shulman@gpmlaw.com]
Sent: Tuesday, January 18, 2005 4:41 PM
To: Hirsh, Adam
Subject: FW: Shell/Texaco

Here is the opposition we will be filing tomorrow to the motion of Visa, Coca Cola, and Microsoft to file an amicus brief in support of the petition in the Supreme Court. Apparently the case is of interest to the two biggest antitrust violators the Division has gone after in the recent past. I also enclose materials from the 9th Circuit record showing the testimony that price-fixing had nothing to do with the claimed efficiencies of the joint ventures, and that any cost savings were not passed on to consumers. I trust that you will distribute the enclosures to the appropriate people at the Division, including those who were at our meeting Friday, January 14.

----- Original Message -----

From: Schaub, Gayle M.
Sent: Tuesday, January 18, 2005 3:30 PM
To: Shulman, Daniel R.
Subject: Shell/Texaco

Opposition to Visa et al. motion to file amici curiae.pdf

Excerpts from Appellate Record.pdf

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MAY 26 2005
OFFICE OF THE CLERK

Nos. 04-805 and 04-814

In the Supreme Court of the United States

TEXACO, INC., PETITIONER

v.

FOUAD N. DAGHER, ET AL.

SHELL OIL COMPANY, PETITIONER

v.

FOUAD N. DAGHER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
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WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products.

TABLE OF CONTENTS

Page

Statement 1
Discussion 7

A. The court of appeals misapplied the principles governing per se analysis under the Sherman Act 7

B. This Court should review and correct the court of appeals' error 17

Conclusion 20

TABLE OF AUTHORITIES

Cases:

Arizona v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) 12, 13, 18

Blackburn v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995) 14

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Business Elecs. Corp. v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988) 7, 14

California v. *American Stores Co.*, 495 U.S. 271 (1990) 10

California Dental Ass'n v. *FCC*, 526 U.S. 756 (1999) 17

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Chevron Corp., In re, No. C-4023 (FTC Jan. 2, 2002) (*available at* <www.ftc.gov/os/2002/01/chevronorder.pdf>) 4

Cases—Continued: Page

Citizen Publ'g Co. v. *United States*, 394 U.S. 131 (1969) 13
Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) 7, 8, 13, 17, 18
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 10, 11, 12
Dr. Miles Med. Co. v. *John D. Park & Sons., Co.*, 220 U.S. 373 (1911) 11
FTC v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) 8
FTC v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) 19
General Leaseways, Inc. v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984) 15
Los Angeles Mem'l Coliseum Comm'n v. *NFL*, 726 F.2d 1381 (9th Cir. 1984) 14
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 18
New York v. *Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995) 10
NCAA v. *Board of Regents*, 468 U.S. 85 (1984) 12, 13
NFL v. *North Am. Soccer League*, 459 U.S. 1074 (1982) 15
Northern Pac. Ry. v. *United States*, 356 U.S. 1 (1958) 7
NYNEX Corp. v. *Discon, Inc.*, 525 U.S. 128 (1998) 18
Palmer v. *BRG of Ga., Inc.*, 498 U.S. 46 (1990) 19

Cases—Continued: Page

Polk Bros., Inc. v. *Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) 15

Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987) 14, 15

SCFC ILC, Inc. v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995) 15

Shell Oil Co., In re, 125 F.T.C. 769 (1998) 3

State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 7, 19

Sullivan v. *NFL*, 34 F.3d 1091 (1st Cir. 1994), cert. denied, 513 U.S. 1190 (1995) 15

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 10, 13

United States v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899) 13, 14

United States v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) 15

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Verizon Communications, Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) 18

Statutes: Page

Clayton Act § 7A, 15 U.S.C. 18a 3
Robinson-Patman Act, 15 U.S.C. 13 6
Sherman Act § 1, 15 U.S.C. 1 ..... *passim*

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62 Fed. Reg. 67,868 (1997) 9, 10
66 Fed. Reg. 48,143 (2001) 4
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Vol. 11 18
Vol. 13 ..... 12, 18, 19

In the Supreme Court of the United States

No. 04-805

TEXACO, INC., PETITIONER

v.

FOUAD N. DAGHER, ET AL.

No. 04-814

SHELL OIL COMPANY, PETITIONER

v.

FOUAD N. DAGHER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, and the judgment below should be reversed.

STATEMENT

Petitioners Shell Oil Co. (Shell) and Texaco, Inc. (Texaco) formed two joint ventures to refine and market gasoline products within the United States. Respondents, a class of 23,000 gas station owners in the western United States, brought a suit alleging that Shell and Texaco violated the antitrust laws by agreeing that the joint venture operating within respondents' geographic region would unify the pricing of the Shell and Texaco brands of gasoline.

Respondents contended that the agreement constituted a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court rejected that theory of liability and granted summary judgment in favor of petitioners, but the court of appeals, in a divided decision, reversed. See Texaco Pet. 2-5; Shell Pet. 2-7; Pet. App. 1a-33a, 46a-69a.[1]

1. Petitioners were once "fierce competitors" in all aspects of the oil and gasoline markets. Pet. App. 3a. In 1998, however, they formed a "nationwide alliance" through two wholly-owned joint ventures that encompassed their "downstream" operations relating to the refining and sale of gasoline in the United States. *Id.* at 3a-4a. The two joint ventures, named Motiva Enterprises and Equilon Enterprises, each assumed responsibility for refining, transporting, and marketing Shell and Texaco gasoline products in distinct geographic regions. *Ibid.* Petitioners transferred all of their domestic downstream assets to those joint ventures and ceased competing separately in the downstream U.S. markets. *Id.* at 5a, 37a; Texaco Pet. 3; Shell Pet. 3-4.[2]

The dispute before this Court involves Equilon, which petitioners formed to own and operate their downstream assets in the western United States. Pet. App. 4a.[3] Petition-

---

[1] "Texaco Pet." and "Shell Pet." refer, respectively, to the petitions for writ of certiorari in No. 04-805 and No. 04-814. "Pet. App." refers to the petition appendix in No. 04-805.

[2] The transfers of assets and personnel included "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees." Pet. App. 4a n.3.

[3] Petitioners (together with a third joint-venture partner) formed Motiva to operate their downstream assets in the eastern United States. Pet. App. 3a-4a. The district court granted petitioners summary judgment on all claims related to Motiva because respondents had never purchased gasoline from Motiva. *Id.* at 34a-45a. The court of appeals affirmed on that point. *Id.* at 10a-12a.

ers' formation of Equilon was not subject to statutory reporting requirements, see 15 U.S.C. 18a, but the Federal Trade Commission (FTC) and four western state attorneys general investigated the transaction. Pet. App. 5a. The FTC issued a complaint alleging that the combination, as originally proposed, would harm competition in seven distinct markets. *In re Shell Oil Co.*, 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent such harm, but did not impose any restrictions on pricing decisions respecting the joint venture's sale of Shell and Texaco products. See *id.* at 778-811.

Under the terms of the consummated joint venture, petitioners granted Equilon an exclusive license to sell gasoline under their brand names in the western United States, and they agreed to split Equilon's profits (or losses) in a fixed ratio based on the assets each contributed to the joint venture. Pet. App. 5a. Thus, each petitioner's returns were determined by Equilon's total profits and not by the relative sales of Shell-branded or Texaco-branded gasoline. The joint venture had an initial term of 20 years, but was terminable by mutual consent at any time, or unilaterally after five years (upon two years' notice). *Ibid.*[4]

At some point, "a decision was made" that Equilon would sell Shell-branded and Texaco-branded gasoline at the "same price in the same market areas," leaving to Equilon the determination of that price. Pet. App. 6a. Although the pricing of the two gasoline brands was unified, Texaco and Shell maintained each brand as a distinct product with "its own unique chemical composition (the gasoline

[4] The district court recognized that, in light of petitioners' extensive financial commitments and operational integration, the mere existence of such termination provisions did not call into question the joint venture's legality. Pet. App. 58a-60a.

is differentiated by separate packages of 'additives'), trademark, and marketing strategy." *Id.* at 6a-7a.

Petitioners continued to compete with each other in their domestic "upstream" operations (*e.g.*, exploring and producing crude oil), in their foreign operations, and in operations unrelated to refining and marketing gasoline (*e.g.*, their chemical, aviation fuels, and marine fuels businesses). See Pet. App. 5a, 56a. In addition, each company "retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand." *Id.* at 5a; see *id.* at 58a.[5]

2. The district court granted petitioners summary judgment, holding in relevant part that respondents "have failed to raise a triable issue of material fact" on whether petitioners have engaged in per se unlawful "price fixing." Pet. App. 68a. The court noted that respondents had "eschewed an exhaustive rule of reason analysis" and instead asserted liability only "under the per se or quick look doctrines." *Ibid.*; see *id.* at 7a, 47a. The district court accordingly found no need to engage in a rule of reason inquiry in resolving the issues before it. See *id.* at 68a.

The district court rejected respondents' contentions that an agreement between Shell and Texaco to unify Equilon's pricing for Shell-branded and Texaco-branded gasoline in each local area would constitute per se unlawful

---

[5] Shell has since bought out Texaco's interest in Equilon, in accordance with the conditions that the FTC imposed on the 2002 combination of Texaco and Chevron. See *In re Chevron Corp.*, No. C-4023 (FTC Jan. 2, 2002) (*available at* <www.ftc.gov/os/2002/01/chevronorder.pdf>). The FTC pointed out at that time that "[a]ll assets in each portion of the Alliance already are under common ownership and control, and divestiture of these interests to Shell * * * would closely maintain the situation that currently exists." FTC, *Analysis to Aid Public Comment*, 66 Fed. Reg. 48,136, 48,143 (Sept. 18, 2001).

horizontal price fixing in violation of Section 1 of the Sherman Act. Pet. App. 52a-54a. The court observed that "every * * * joint venture must, at some point, set prices for the products they sell." *Id.* at 53a. Respondents' theory, the court explained, would essentially "act as a per se rule against joint ventures between companies that produce competing products." *Id.* at 54a.

3. A divided panel of the Ninth Circuit reversed the district court's grant of summary judgment. Pet. App. 1a-33a. The court of appeals remanded for further proceedings to determine whether Shell and Texaco had committed a per se violation of the Sherman Act by agreeing that Equilon would charge identical prices for the two gasoline brands. *Id.* at 21a-23a, 27a-28a.

The court of appeals viewed the case as presenting the question whether the courts should "find an exception to the *per se* prohibition on price-fixing where two entities have established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands." Pet. App. 12a-13a.[6] The court acknowledged that Equilon was a "legitimate," efficiency-enhancing joint venture. *Id.* at 4a-5a,

---

[6] The court assumed that Shell and Texaco reached an agreement to unify prices at the formation of their alliance. See Pet. App. 13a ("the companies fixed the prices * * * by agreeing *ex ante* to charge the exact same price for each"); *id.* at 19a n.11 ("there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands"). See also *id.* at 6a (the "decision to charge the same price for the two distinct brands 'was developed as sort of an operating requirement right from the very start or near to the very start of the alliance'"); *id.* at 22a (petitioners "*unified* the pricing of the two brands from the time the alliance was formed"). Neither the panel majority nor respondents have suggested that the agreement to unify prices—regardless of its timing—affected or applied to the prices of gasoline or other products sold by Texaco or Shell rather than by Equilon or Motiva.

9a. The court viewed the pricing agreement, however, as one subject to the ancillary restraints doctrine and concluded that the agreement to unify prices was a "naked" restraint, *id.* at 16a-17a, in the absence of a showing that it was "reasonably necessary to further the legitimate aims of the joint venture," *id.* at 21a.

The court of appeals rejected petitioners' proffered justification for the agreement—that it was intended to avoid potential suits for price discrimination under the Robinson-Patman Act, 15 U.S.C. 13—on the grounds that that Act was "unquestionably * * * inapplicable." Pet. App. 25a. The court also rejected petitioners' argument that application of the per se rule would interfere with the ability of joint ventures to set prices for their products. *Id.* at 26a-27a. In the court's view, the "question is whether two former (and potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands." *Ibid.* The per se rule applies, the court asserted, "when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture—a relationship that justifies the otherwise prohibited price restraints." *Id.* at 27a. "Thus far," the court concluded, petitioners had failed to produce evidence "demonstrating that their price fixing scheme was ancillary rather than naked." *Ibid.*

Judge Fernandez dissented. Pet. App. 28a-33a. He observed that Equilon, rather than petitioners, competed in the business of refining, transporting, and marketing gasoline in the western United States. *Ibid.* Equilon "ran the refinery; it had the research facilities; it transported products; and it dealt with the station operators and other buyers. It also priced the products, and set the same price for *its* Shell and Texaco brands." *Id.* at 29a. In his view,

"nothing more radical is afoot than the fact that an entity * * * prices its own products." *Id.* at 31a-32a.

DISCUSSION

The court of appeals' decision mistakenly holds that an agreement between the owners of a lawful joint venture respecting the pricing of their joint venture's products may constitute a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The court's error is serious, it upsets the previously settled understanding of the scope of per se liability and the lawful operation of joint ventures, and it warrants this Court's review and correction.

A. The Court Of Appeals Misapplied The Principles Governing Per Se Analysis Under The Sherman Act

1. This Court has properly construed the Sherman Act to confine the role of per se rules in identifying anticompetitive activity. "Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997). The rule of reason is the "prevailing standard of analysis," and any departure from that standard "must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49, 58-59 (1977). See *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard").

Departures from rule of reason analysis are limited to those "restraints * * * hav[ing] such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *Khan*, 522 U.S. at 10 (citing *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958)). Per se rules—which

obviate the need to prove that the challenged conduct unreasonably restrains competition—are "appropriate only when they relate to conduct that is manifestly anticompetitive." *GTE Sylvania*, 433 U.S. at 49-50. See, *e.g*, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986) (expressing reluctance to adopt per se rules with regard to "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious").

2. The court of appeals plainly erred in concluding that an agreement between petitioners to unify Equilon's pricing for its Texaco-branded and Shell-branded gasoline could result in a per se violation of Section 1 of the Sherman Act. The court of appeals did not question that Shell and Texaco lawfully could form Equilon to combine their "downstream" operations in the western United States into a single entity that would refine and market their gasoline products. The court nevertheless concluded that those companies could face per se condemnation for additionally agreeing that the newly formed entity would employ a unified pricing mechanism for the two gasoline brands under its control.[7]

The court of appeals' conclusion fails to come to grips with a fundamental feature of the joint venture. As that court and respondents have recognized, Equilon's *formation* eliminated all competition between Shell and Texaco with respect to the refining and sale of gasoline in the western United States. See Pet. App. 5a; Br. in Opp. 5. Upon

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[7] The court of appeals' pejorative description of the agreement as "price fixing" (Pet. App. 16a) does not resolve whether per se treatment is appropriate. This Court has recognized that "price fixing" is illegal per se, but that "easy labels do not always supply ready answers." *BMI, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 8 (1979). As in *BMI*, the conduct here is not "price fixing" as that term is "generally used in the antitrust field." *Id.* at 9.

forming Equilon, each petitioner ceased its separate participation in the relevant domestic downstream markets. Pet. App. 5a; Texaco Pet. 3; Shell Pet. 3. The FTC, when it reviewed the creation of the joint venture, thus treated Equilon's formation as a merger of downstream operations. See FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). It accordingly applied the antitrust enforcement standards that the Justice Department and the FTC each apply to such mergers and evaluated the joint venture in essentially the same way it would have analyzed the complete merger of Shell and Texaco if they had no operations other than downstream operations.[8]

Section 1 of the Sherman Act unquestionably applies to an agreement between competitors to form a joint venture

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[8] See DOJ & FTC, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) (*Competitor Collaboration Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (Apr. 12, 2000) (*available at* <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>). Section 1.3 of the *Competitor Collaboration Guidelines* spells out the conditions under which a competitor collaboration "ordinarily" should be treated as a horizontal merger and analyzed under the agencies' *Horizontal Merger Guidelines* (*reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 2, 1992, rev. Apr. 8, 1997) (*available at* <http://www.usdoj.gov/atr/public/ guidelines/hmg.pdf>)):

> (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period [ordinarily, ten years] by its own specific and express terms.

Competitor Collaboration Guidelines § 1.3 (footnotes omitted). See *id*. App. Example 1 (merger analysis should apply when "[t]wo oil companies agree to integrate all of their refining and refined product marketing operations"). Equilon satisfies all four of those criteria. See pp. 2-3, *supra*. See also 13 Herbert Hovenkamp, *Antitrust Law* ¶ 2121, at 17-129 (2d ed. 2005) (describing when production joint ventures should be treated as mergers); *id*. ¶ 2123, at 147.

that eliminates competition between them.[9] The agreement may be unlawful per se if it does not involve an efficiency-enhancing integration of economic activity. *E.g.*, *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597-598 (1951). But per se analysis is not appropriate if the joint venture involves efficiency-enhancing integration. The FTC thoroughly reviewed petitioners' alliance, and both courts below agreed that Equilon was an efficiency-enhancing venture. Pet. App. 4a-5a, 9a, 50a. There is no basis for serious suggestion in this case that the formation of Equilon was a mere sham designed to mask cartel conduct.[10]

It is well settled that the formation of an efficiency-enhancing joint venture is "judged under a rule of reason" because it "hold[s] the promise of increasing a firm's efficiency and enabling it to compete more effectively," *Copperweld Corp.* v. *Independence Tube Co.*, 467 U.S. 752, 768

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[9] Texaco argues that Section 1 does not apply to the conduct alleged in this case because respondents in fact challenge the pricing decisions of the joint venture, not a pricing agreement between petitioners. Texaco Pet. 10-13, 18-22; see also Shell Pet. 15-16. That issue is not present at this stage of the proceedings, however, because the court of appeals' decision rests on the disputed factual premise that the decision to unify pricing was made by petitioners at or before the joint venture's formation. Pet. App. 19a & n.11; see also note 6, *supra*. Texaco concedes that "the decision of two companies to form a joint venture is a 'merging of resources' to which Section 1 applies." Texaco Pet. 18 (quoting *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984)).

[10] See FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). Although a government consent decree provides powerful evidence of the lawfulness of a merger or joint venture, see *BMI, Inc.*, 441 U.S. at 13, 16, Texaco and petitioners' amici are wrong to suggest (Texaco Pet. 20; Antitrust Scholars *Amicus* Br. 12-15) that the FTC's prior review of Equilon's formation placed that transaction beyond judicial review. See, *e.g.*, *California* v. *American Stores Co.*, 495 U.S. 271 (1990) (California successfully challenged supermarket merger despite FTC's review of the transaction); *New York* v. *Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995).

(1984). See also 7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478, at 318 (2d ed. 2003) (a "venture's formation results from the founders' 'agreement,' which, like any other formation agreement, can be appraised for 'reasonableness' under Sherman Act § 1"). There is no reason to apply per se analysis, rather than the rule of reason, to a single aspect of the joint venture arrangement—here, the unified pricing of gasoline brands—that merely reflected, but did not cause, the elimination of competition.

Equilon's formation eliminated *all* price and non-price competition, in any sense relevant to Section 1, between the two brands of gasoline in the western United States. That fact remained true, regardless of how Equilon (or petitioners as Equilon's owners) priced the two brands. A remedial order compelling Equilon to price the brands independently would not create meaningful competition between the brands. Competition between brands under the exclusive control of a unitary company is not competition with which Section 1 is concerned. See *Copperweld*, 467 U.S. at 771 (rejecting intra-enterprise conspiracy doctrine). The court of appeals did not identify any other competition threatened by the pricing agreement.[11]

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[11] Because the joint venture was not a supplier of inputs to the venture participants, the venture could not have been facilitating a cartel in the gasoline markets by artificially inflating the venture participants' input costs. And because the two companies did not have a vertical relationship in the domestic downstream markets—neither sold gasoline or pipeline services to the other—they could not have entered into a per se unlawful vertical price fixing agreement. Cf. *Dr. Miles Med. Co.* v. *John D. Park & Sons., Co.*, 220 U.S. 373 (1911). Texaco and Shell did continue to compete outside their joint ventures' spheres. Pet. App. 56a; Shell Pet. 3. Respondents, however, have not argued that the agreement to unify Equilon's prices of Texaco-branded and Shell-branded gasoline affected competition in those other markets, *e.g.*, by manipulating the value of the companies' trademarks. See *BMI*, 441 U.S. at 23-24 (distinguishing situation in which competing copyright holders "use the

Per se treatment would be inappropriate even if, contrary to the court of appeals' premise, petitioners' agreement to unify the pricing of the two brands occurred *after* Equilon became operational. Texaco and Shell were not independent participants in the downstream markets at that point and therefore were incapable of forming a horizontal agreement—*i.e.*, "an agreement among competitors on the way in which they will compete with one another," *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984)—with respect to operations in those markets. Rather, petitioners would have been acting solely in their capacity as owners of a marketplace participant. See *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) ("partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit" are "regarded as a single firm competing with other sellers in the market"). This Court's decision in *Copperweld* would preclude any application of Section 1 in that context. See 467 U.S. at 771.

Application of the per se rule would also be inconsistent with *BMI, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979). In *BMI*, this Court rejected the argument that participants in a legitimate joint venture engage in price fixing subject to the per se rule when they set the price at which the venture sells its products to third parties. The Court noted that such a practice cannot be categorically described as "'plainly anticompetitive' and very likely without 'redeeming virtue.'" 441 U.S. at 9. As the Court observed, "[w]hen two partners set the price of their goods or services they are literally

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blanket license to mask price fixing in such other markets"). Cf. 13 Hovenkamp, *supra*, ¶ 2122, at 132 (a joint venture may pose a threat to competition if it "eliminat[es] the competition that exists between the joint venture participants outside the venture. This might happen if the joint venture becomes an excuse for price fixing with respect to the venturers' non-venture business.").

'price fixing,' but they are not *per se* in violation of the Sherman Act." *Ibid.*

In sum, because the alleged agreement to unify the pricing of Texaco-branded and Shell-branded gasoline did not eliminate competition, there is no basis for adjudging it as "manifestly anticompetitive" and subject to per se condemnation. See *GTE Sylvania*, 544 U.S. at 49-50.[12]

3. The court of appeals compounded its error by applying the ancillary restraints doctrine to this case. The court proceeded from its premise that the agreement to unify prices constituted unlawful "price fixing" to conclude that petitioners could avoid per se condemnation only by showing that the agreement was "ancillary" to and "reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 15a-18a, 21a; see *id.* at 22a & n.14, 27a. The court erred fundamentally by applying that test to an agreement between owners of a legitimate joint venture with respect to the prices at which the venture sells products in markets in which the owners do not separately compete.

Judge Taft's decision in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899), which recognized that certain consensual restraints may ultimately facilitate competition, introduced

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[12] The decisions on which the court of appeals and respondents rely are easily distinguishable. See *Citizen Publ'g Co.* v. *United States*, 394 U.S. 131, 133-134 (1969) (agreement fixed prices and pooled profits for defendants' separately owned and produced news and editorial content); *NCAA*, 468 U.S. at 114-115 & n.54 (rule of reason applied to agreement restricting individual members' non-venture output of television broadcasts); *Maricopa*, 457 U.S. at 356-357 (doctors' joint venture lacked pooling of capital or sharing of risks and was merely an agreement among "independent competing entrepreneurs" "concerning the price at which each will offer his own services to a substantial number of consumers"); *Timken*, 341 U.S. at 597-598 (joint venture did not involve any efficiency-enhancing integration).

the ancillary restraints doctrine into antitrust law. That doctrine "teaches that some agreements which restrain competition may be valid if they are 'subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.'" *Los Angeles Mem'l Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984) (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 797-798 (1965)), cert. denied, 469 U.S. 990 (1994).[13]

Since Judge Taft's first articulation of the ancillary restraints doctrine in *Addyston Pipe*, 85 F. at 280, courts invoking the doctrine have required joint venture partners to demonstrate the reasonable necessity of restrictions on their own conduct outside the venture. For example, charge card joint ventures must demonstrate the reasonable necessity of an agreement that members not issue certain competing cards. See *United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003), cert. denied, 125 S. Ct. 45 (2004). Lawyers dissolving their partnership must demonstrate the reasonable necessity of agreed-upon territorial restrictions on advertising by the former partners. See *Blackburn* v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995). And truck leasing companies agreeing to provide service for each others' trucks must demonstrate the reasonable necessity of adopting territorial restrictions on leasing competi-

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[13] "To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), cert. denied, 479 U.S. 1033 (1987). "The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 (1988).

tion. See *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984).[14]

As the foregoing cases demonstrate, the courts have regularly applied the ancillary restraints doctrine to agreements respecting joint venture participants' conduct outside of the joint venture. Some courts have also applied the doctrine to restraints on admission to joint venture membership.[15] But so far as the United States is aware, the court of appeals' decision in this case is the first ruling to apply the ancillary restraints doctrine to constraints on the joint venture's *own* conduct. In any event, as noted, the joint venture's own conduct within its legitimate scope does not affect competition in the Section 1 sense. The court of appeals' error here is particularly striking because the agreement that the court separated out from the venture for per se analysis is so clearly integral to that venture and unrelated to the independent conduct of the owners.[16]

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[14] See also *NFL* v. *North Am. Soccer League*, 459 U.S. 1074, 1077-1078 (1982) (Rehnquist, J., dissenting from denial of certiorari) (applying ancillary restraints doctrine to a sports league's restraint on members' ownership of other sports teams); *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 613 (1972) (Burger, C.J., dissenting) (applying ancillary restraints doctrine to a restraint on the territories in which a joint venture's members could sell the products supplied to them by the venture); *Polk Bros., Inc.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 188-190 (7th Cir. 1985) (applying ancillary restraints doctrine to limitation on which products joint venturers could sell in their adjacent retail stores); *Rothery Storage & Van Co.*, 792 F.2d at 223-230 (applying ancillary restraints doctrine to prohibition against moving company's agents using joint venture property for non-venture business).

[15] See, *e.g.*, *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 968 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995); *Sullivan* v. *NFL*, 34 F.3d 1091, 1102-1103 (1st Cir. 1994), cert. denied, 513 U.S. 1190 (1995); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1374-1387 (5th Cir. 1980).

[16] The court of appeals' hypothetical example of two soft drink companies entering into a joint research venture accompanied by a price-fixing agreement highlights the distinction. See Pet. App. 16a. The companies' agreement to fix

The ancillary restraints doctrine can serve an important role in distinguishing legitimate cooperative activity from sham undertakings designed to disguise "an old-fashioned price fixing cartel." Pet. App. 50a. The federal enforcement agencies, in turn, apply the per se rule to naked restraints, and the Department of Justice may prosecute them criminally. *Competitor Collaboration Guidelines* § 3.2. But there is no justification for invoking the ancillary restraints doctrine in this case. Here, the owners of a concededly efficiency-enhancing joint venture allegedly agreed to unify the pricing of separately branded products that the joint venture was formed to produce and sell. The agreement governed only the conduct of the joint venture; it did not restrain competition by the joint venturers outside the joint venture, and it applied only to those markets from which the venturers entirely exited as part of the venture's formation. The agreement was not *collateral* to the joint venture but instead addressed an integral aspect of the venture's operation, namely, the pricing of its own products. The ancillary restraints doctrine simply has no role to play in this case.

The court of appeals thus erred in concluding that the facts here might justify per se condemnation. Because respondents "disclaimed any reliance on the traditional 'rule of reason' test" (Pet. App. 7a), the failure of respondents' per se theory necessitates reversal.[17]

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the price at which *they* independently sell their products has no apparent relationship to the joint research venture and is therefore categorically different from the agreement at issue here, which related solely to the price at which the *joint venture* would sell *its* products.

[17] The court of appeals noted that respondents also asserted a "quick look" theory, Pet. App. 7a, but it declined to reach that theory of liability, *id.* at 13a n.7. Quick look analysis, however, is available only when "an observer with even a rudimentary understanding of economics could conclude that the

B. This Court Should Review And Correct The Court Of Appeals' Error

1. The issue presented by the petitions is narrow but important. The decision below chills legitimate and beneficial economic activity by raising the specter of per se liability for efficiency-enhancing joint ventures that unite formerly competing products under common ownership and pricing control. More generally, the court of appeals' improper expansion of per se liability to encompass agreements that are not clearly anticompetitive potentially undercuts the per se rule's value in discouraging unlawful conduct and facilitating effective enforcement of the antitrust laws. Per se rules establish bright-line tests that identify obviously pernicious conduct, powerfully deterring plainly unlawful behavior and providing clear guidance to businessmen and antitrust counselors. The court of appeals' decision both blurs the bright line and sweeps too broadly, erroneously extending per se condemnation to a class of agreements that cannot be fairly described as "manifestly anticompetitive," *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977).

The court of appeals' expansion of the scope of the per se rule to conduct that is not manifestly anticompetitive casts a shadow over the critical decisions of numerous businesses to the detriment of the national economy. In particular, production joint ventures, such as Equilon, are increasingly common and often have substantial procompetitive potential. See *Competitor Collaboration Guidelines*

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arrangements in question have an anticompetitive effect on customers and markets." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770 (1999); see *ibid.* (quick look applies "when the great likelihood of anticompetitive effects can easily be ascertained"). Respondents have offered no economic theory that would justify such an approach to the pricing of Equilon's products in this case.

Preamble; *id.* § 2.1; 13 Hovenkamp, *supra*, ¶ 2121, at 125-127. The prospect of per se condemnation—and the accompanying risk of treble-damages liability—for conduct integral to the operation of such a venture, such as pricing the products it sells, would no doubt encourage unsound private antitrust suits and correspondingly chill procompetitive conduct.[18] The adverse consequences of false condemnations are particularly severe if plaintiffs can invoke a per se rule and avoid any obligation to prove that the specific conduct unreasonably restrained competition.[19]

The per se rule plays a critical role in effective antitrust enforcement by streamlining litigation involving the practices that most seriously threaten competition. See *Maricopa County Med. Soc'y*, 457 U.S. at 344; *BMI, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 8 n.11 (1979); *GTE Sylvania*, 433 U.S. at 50 n.16. In particular, effective criminal prosecution of hard-core cartel conduct—such as horizontal price fixing, bid rigging, and market allocation—would be immensely more difficult if defendants were permitted to complicate jury trials

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[18] Pricing decisions are a core function of any production joint venture. See 11 Hovenkamp, *supra*, ¶ 1908, at 263-264 ("agreements about price are often essential to the administration of certain joint ventures, particularly in distribution"); 13 Hovenkamp, *supra*, ¶ 2132, at 180 ("joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold"). All of the circumstances surrounding Equilon's formation reinforce the general principle that the rule of reason, rather than the per se rule, should apply. See pp. 7-13, *supra*; see also *GTE Sylvania*, 433 U.S. at 59 ("[w]hen anticompetitive effects are shown to result from particular [] restrictions they can be adequately policed under the rule of reason").

[19] Cf. *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("false condemnations 'are especially costly, because they chill' " procompetitive conduct) (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)); *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 136-137 (1998) (expressing concern about transforming business torts "into treble-damages antitrust cases").

with extended arguments about the reasonableness of such practices. The enforcement agencies also invoke per se rules in civil cases involving unambiguously anticompetitive practices. See, *e.g.*, *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). Decisions applying the per se rule to conduct that not only lacks "predictable and pernicious anticompetitive effect," but may even have substantial "potential for procompetitive benefit," *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997), has the potential to erode the rationale for per se treatment and may foster judicial reluctance to use such a blunt instrument.

2. The United States submits that the Court should grant the petitions for a writ of certiorari and repudiate the court of appeals' unwarranted expansion of the per se rule. Indeed, the decision below is so clearly wrong that the Court may wish to consider summary reversal, rather than plenary review. See *Palmer* v. *BRG of Ga., Inc.*, 498 U.S. 46 (1990) (per curiam); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam).

This Court's decisions leave no doubt that the alleged agreement to unify the prices of Equilon's gasoline brands cannot be per se unlawful under the circumstances presented here. See pp. 7-16, *supra*. The court of appeals assumed that the challenged agreement was entered into as part of the joint venture's formation, but the court's decision is mistaken regardless of the timing of the purported agreement.[20] The Court can correct the court of appeals'

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[20] It is not clear whether the decision to unify prices was made before or after Equilon became operational. See Pet. App. 19a n.11 ("there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands"). Respondents appear to argue the point both ways. Compare Br. in Opp. 11 (petitioners "agreed even before the ventures came into existence to eliminate all competition between their brands of gasoline, including, certainly by implication if not

decision on that basis alone without reaching the alternative bases for reversal.[21]

In any event, the Court should review and correct the court of appeals' decision. Because the court of appeals' opinion can, and likely will, be read to expand very substantially the scope of the per se rule, it poses a threat to the proper enforcement, both private and public, of the antitrust laws. Accordingly, this Court should reaffirm the critical, but carefully limited, role of the per se rule in antitrust cases by granting the petitions and reversing the judgment below.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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expressly, price competition") with *id.* at 12 ("the price-fixing challenged in this action was clearly a decision of Shell and Texaco in their exercise of control over the operations of the venture"). It is also not clear whether the decision was made by Shell and Texaco officials or by Equilon officials. Compare Pet. App. 13a (panel majority) with *id.* at 29a (dissent). As discussed above, however, those questions ultimately have no bearing on the proper outcome of this case. See pp. 8-13, *supra*.

[21] For example, given the court of appeals' premise that the petitioners had agreed to unify prices at the time of Equilon's formation, there is no need for the Court to consider whether a subsequent agreement among the owners of the venture would be subject to Section 1 of the Sherman Act. And because the joint venture itself eliminated all competition between petitioners' downstream operations, and the challenged agreement involved conduct that is clearly integral to the operation of the joint venture and unrelated to the separate activities of the venture's owners, there is no need for the Court to consider the application of the ancillary restraints doctrine. See pp. 12-16, *supra*.

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IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL CO.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF ANTITRUST SCHOLARS FOR LEAVE TO FILE BRIEF AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF ANTITRUST SCHOLARS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Robert Pitofsky, Kenneth G. Elzinga, and Ernest Gellhorn ("*amici*") hereby move, pursuant to Rule 37 of this Court, for leave to file a brief as *amici curiae* in support of the petitions for writs of *certiorari* to the United States Court of Appeals for the Ninth Circuit. Counsel for the Petitioners have consented to the filing of this brief. Counsel for the Respondents has not.

Amici are professors of antitrust law or of economics at leading American law schools and universities. They research, teach, and write on antitrust law and the economics of industrial organization, and have an interest in the development and application of American antitrust law. In some cases *amici* have served in senior positions in the Antitrust Division of the United

States Department of Justice or the Federal Trade Commission, which are charged with enforcing the antitrust laws.

Counsel of Record Robert Pitofsky is the Joseph and Madeline Sheehy Professor in Antitrust and Trade Regulation Law and Dean Emeritus of the Georgetown University Law Center. Professor Pitofsky served as Chairman of the Federal Trade Commission between 1995 and 2001 and previously served as a Federal Trade Commissioner and as the Director of the FTC's Bureau of Competition. In 2002 Professor Pitofsky received the Miles W. Kirkpatrick Award for Lifetime FTC Achievement.

Kenneth G. Elzinga is the Robert C. Taylor Professor of Economics at the University of Virginia, where he specializes in the economics of industrial organization. He is the author of dozens of books and articles on antitrust economics, including four that have been cited with approval by this Court.[1] Professor Elzinga has taught economics to federal judges and been appointed a court-appointed expert to advise a district judge in antitrust litigation. *See In re Auction Houses Antitrust Litig.*, No. 00 Civ. 0648, 2000 WL 1840030 (S.D.N.Y. Dec. 13, 2000). He previously served as a Special Economic Assistant to the head of the Antitrust Division and has been retained as a consultant by both the Federal Trade Commission and the Antitrust Division in major merger cases.

Ernest Gellhorn teaches antitrust law at George Mason University, where he is a Professor of Law. Professor Gellhorn formerly served as the dean of the schools of law at Case Western Reserve University, the University of Washington, and Arizona

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[1] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (citing Professor Elzinga's article with David E. Mills regarding testing for predation); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 n.8 (1981) (citing Professor Elzinga's 1976 book with William Breit on antitrust penalties); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 551 (1973) (citing Professor Elzinga's 1971 article on the economics of the American beer industry); and *Ford Motor Co. v. United States*, 405 U.S. 562, 582 (1972) (citing Professor Elzinga's 1969 article on antitrust remedies).

State University, and taught law at University of Virginia and Duke University. He was coeditor of George Mason's *Supreme Court Economic Review* and is the author of numerous articles on antitrust.

Amici recognize the important and procompetitive role that joint ventures play in the American economy and believe that the Ninth Circuit Court of Appeals has committed a fundamental error by imposing *per se* antitrust liability on just such a procompetitive joint venture. If allowed to stand, the Ninth Circuit's decision would be a unique precedent allowing courts to penalize firms that cooperate to bring consumers better products at lower prices without regard to the absence of actual competitive harm, thus undermining the entire purpose of the antitrust laws.

Amici believe their brief will provide the Court with relevant legal and factual information not already brought to the Court's attention by the parties. Specifically, the brief discusses (i) the role under this Court's precedents of the Federal Trade Commission's review of the challenged conduct in determining whether *per se* condemnation is appropriate; and (ii) the inconsistency of the Ninth Circuit's decision with this Court's precedents addressing the relationship between Section 7 of the Clayton Act and Section 1 of the Sherman Act. Neither issue is discussed in the petitioners' briefs. The brief also brings to the Court's attention additional facts regarding the importance of joint ventures, including work of prominent economists on this subject.

Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief *amici curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL CO.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

A. Factual Background. 1

B. The Decisions Below. 3

SUMMARY OF ARGUMENT 5

REASONS FOR GRANTING THE WRIT 8

I. The Ninth Circuit's Decision Conflicts With Decisions Of This Court Requiring Consideration Of The Context Of The Restraint When Assessing Whether To Apply The *Per Se* Rule 8

A. The Ninth Circuit Ignored This Court's Command That Summary Condemnation Is Appropriate Only Where The Likelihood Of Anticompetitive Effects Is Obvious. 8

B. The Ninth Circuit's Decision Conflicts With Decisions Of This Court Requiring Consideration Of The Views Of The Federal Antitrust Enforcers 12

II. The Ninth Circuit's Decision Conflicts With This Court's Decisions Addressing The Relationship Between Section 7 Of The Clayton Act And Section 1 Of The Sherman Act. 15

III. This Case Is Of Great Importance Because Of The Critical And Procompetitive Role That Joint Ventures Play In The American Economy. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases *Page*

Advocacy Organization for Patients and Providers v. Mercy Health Services, 987 F. Supp. 967 (E.D. Mich. 1997) 14

Arizona v. Maricopa Medical Society, 457 U.S. 332 (1982) 12

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 6, 9, 14, 15, 16, 17

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 6, 7, 15

California Dental Association v. FTC, 526 U.S. 756 (1999) 6, 9

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) 11

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 9, 11, 20

Dagher v. Saudi Refining, Inc., 369 F.3d 1108 (9th Cir. 2004) ..... *passim*

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 8

Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946) 9

NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) 6, 10, 20

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 8

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 6, 10

Pearl Brewing Co. v. Miller Brewing Co., Civ. No. SA-93-CA-205, 1993-2 Trade Cases (CCH) ¶70,370 (W.D. Tex. Mar. 31, 1993), *aff'd*, 52 F.3d 1066 (5th Cir. 1995) 14

United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964) 15, 16, 17, 19

Page

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 7, 15

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 12

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 11

White Motor Co. v. United States, 372 U.S. 253 (1966) 9

Statutes and Rules

Clayton Act § 7, 15 U.S.C. § 18 ..... *passim*

Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a 2

S. Ct. R. 10(c) 5

Sherman Act § 1, 15 U.S.C. § 1 ..... *passim*

Federal Trade Commission Administrative Materials

Federal Trade Commission, Press Release, *Shell, Texaco To Divest Assets To Settle FTC Charges* (Dec. 19, 1997), *available at* http://www.ftc.gov/opa/1997/12/ shell.htm. 3

In the Matter of General Motors Corp., 103 F.T.C. 374 (1984) 3, 13

In the Matter of Shell Oil Co., 125 F.T.C. 769, 774-77 (1998) (Administrative Complaint) 2, 3

In the Matter of Shell Oil Co., 125 F.T.C. 769, 777-93 (1998) (Decision & Order) 3

In the Matter of Shell Oil Co., Federal Trade Commission Analysis to Aid Public Comment, 62 Fed. Reg. 67,868, at 67,871 (Dec. 30, 1997) 3, 13

Other Materials *Page*

Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1966) 10

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* appears in the accompanying motion.[1]

STATEMENT OF THE CASE

A. Factual Background.

This case addresses the antitrust treatment of the creation in 1998 of two related joint ventures. The first joint venture, called Equilon Enterprises, was created when Texaco, Inc. and Shell Oil Co. contributed their assets used in the refining and marketing of petroleum in the midwestern and western United States. The second joint venture, called Motiva Enterprises, was created when Texaco and Saudi Refining, Inc. (which had previously created a gasoline refining and marketing joint venture called Star Enterprise) and Shell contributed their assets used in the refining and marketing of petroleum in the eastern United States. Shell owns 56% of Equilon and 35% of Motiva; Texaco owns 44% of Equilon and 32.5% of Motiva; and Saudi Refining owns 32.5% of Motiva. *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1111-12 (9th Cir. 2004).

Although the joint ventures combined the refining and marketing operations of Shell and Texaco, the parties to the joint ventures agreed that Equilon and Motiva would continue to sell under both the Shell and Texaco brands because the brands appealed to different customers, with Texaco customers tending to be "more blue-collared and rural than Shell customers, who are more affluent and urban." *Id.* at 1112. A single individual at each joint venture was responsible for setting a coordinated price for the two brands. *Id.* This decision to charge the same price for both brands (within a given geographic area) was an integral element of the joint ventures, developed "right from the start or near to the

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[1] Counsel for *amici* states that no counsel for a party authored this brief in whole or in part. Visa U.S.A. has made a monetary contribution to the preparation and submission of this brief.

very start of the alliance" and part of a plan to "produce and promote both brands more competitively." *Id.*

As the court of appeals concluded, the joint ventures "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." *Id.* at 1111. Not only would the joint ventures, rather than Shell and Texaco, control the pricing and promotion of gasoline, but after contributing their refining and marketing assets to the joint ventures, both Texaco and Shell agreed that they would not compete with the joint ventures they had created. *Id.*

The plaintiffs have never claimed that the joint ventures were mere shams to cover a naked price fixing agreement. *Id.* at 1126 (dissenting opinion). The court of appeals recognized that the joint ventures involved "collective assumption of risk and resource pooling," and that through these collective efforts Shell and Texaco believed that they could obtain synergies and cost efficiencies of up to $800 million per year. *Id.* at 1111-12.

Because the joint ventures involved the acquisition of assets they were reportable under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, and the Federal Trade Commission (the "FTC") conducted a full investigation and review of their likely competitive effects. After a multi-month review in collaboration with the Attorneys General of California, Hawaii, Oregon, and Washington, the FTC concluded that unless restructured the joint ventures would likely harm competition in seven relevant product and geographic markets, including markets for gasoline in San Diego and Oahu. *In the Matter of Shell Oil Co*, 125 F.T.C. 769, 774-77 (1998) (Administrative Complaint).[2]

The FTC was fully cognizant of the fact that Shell and Texaco had agreed that they would no longer compete in the retail sale of

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[2] Commissioner Azcuenaga dissented in part, concluding that there was no reason to believe that the joint ventures, if consummated, would harm competition in any market other than the refining of asphalt in Northern California. 125 F.T.C. at 812 (Separate Statement of Commissioner Mary L. Azcuenaga Concurring in Part and Dissenting in Part).

gasoline and that the joint ventures – rather than their parents – would control the pricing and marketing of the joint ventures' products. Although some manufacturing joint ventures are structured to supply product back to their parents for sale, and thus do not eliminate pricing competition, *see, e.g.*, *In the Matter of General Motors Corp.*, 103 F.T.C. 374 (1984) (manufacturing joint venture between General Motors and Toyota), that was not the case here. The FTC specifically recognized that the effect of the joint venture would be to "eliminat[e] direct competition in the terminaling and wholesale and retail sales of gasoline and diesel fuel," *Shell Oil*, 125 F.T.C. at 777 (Administrative Complaint ¶ 37), and treated the transaction as "reduc[ing] the six competitors to five" in local gasoline distribution. *In the Matter of Shell Oil Co.*, Federal Trade Commission Analysis to Aid Public Comment, 62 Fed. Reg. 67,868, at 67,871 (Dec. 30, 1997).

In order to resolve the FTC's competitive concerns, Shell and Texaco, without admitting liability, entered a consent decree requiring them to divest assets in the seven challenged markets to restore any competition lost as a result of the creation of the joint ventures. 125 F.T.C. at 777-93 (Decision & Order).[3] The divestitures required by the consent decree fully "alleviate[d] the alleged competitive concerns arising from the Joint Venture." 62 Fed. Reg. at 67,869.

B. The Decisions Below.

The plaintiffs, on behalf of a putative class of 23,000 Shell and Texaco service station owners, challenged the creation of the joint ventures as an unlawful price fixing scheme. Plaintiffs disclaimed any reliance on the traditional rule of reason standard applied to most agreements under the antitrust laws and rested their entire claim on either the *per se* rule or a "quick look" theory of liability. 369 F.3d at 1113.

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[3] The four state Attorneys General entered similar consent decrees with the parties to address their competitive concerns. *See* Federal Trade Comm'n, Press Release, Shell, Texaco To Divest Assets To Settle FTC Charges (Dec. 19, 1997), *available at* http://www.ftc.gov/opa/1997/12/shell.htm.

The district court granted summary judgment to the defendants. As the Ninth Circuit summarized its decision:

> The court concluded – relying on the detailed and costly negotiations leading up to the creation of the joint ventures – that Equilon and Motiva were plainly not "fly-by-night" operations designed to cover up an elaborate price-fixing scheme. Moreover, the court found that Motiva and Equilon produced sufficient efficiencies and were sufficiently integrated to constitute indisputably legitimate joint ventures under either the *per se* rule or a "quick look" analysis. Finally, the district court concluded that, because every joint venture "must, at some point, set prices for the products they sell" (citation omitted), a theory which made it illegal for a joint venture to fix prices of its various brands would "act as a *per se* rule against joint ventures between companies that produce competing products."

Id. at 1114.

The Ninth Circuit reversed in a split decision. The decision ignored the Federal Trade Commission's analysis and conclusion that the joint ventures as restructured would not harm competition, and instead condemned the joint pricing of gasoline sold by the ventures as *per se* unlawful price fixing.

The majority placed great weight on the fact that the joint venturers had not established that it was necessary to set a *single* price for the Shell and Texaco brands, noting that they found it "significant that the defendants here did not simply consolidate the pricing decisions within the joint ventures – they *unified* the pricing of the two brands from the time the alliance was formed by designating one individual in each joint venture to set a single price for both brands." *Id.* at 1122. The *per se* rule was therefore applicable, the court held, because the joint venturers had "failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the venture's legitimate efforts to produce better products or capitalize on efficiencies." *Id.*

The court recognized that "when two competing companies agree to merge . . . they generally agree to adopt a uniform pricing scheme" and that the "Supreme Court has permitted such agreements." *Id.* at 1117-18. But the majority distinguished the merger situation, believing that in a merger two firms "combine their product lines, or . . . eliminate the old product lines and create an entirely new one." *Id.* at 1118. The joint ventures were different, the court held, because Equilon and Motiva would be setting the price of "two . . . distinct product brands." *Id.* at 1124. The "analysis would be different," the court noted, if it had "confronted a joint venture in which former competitors . . . . agreed to merge their product lines into one collective brand." *Id.* The court did not discuss the FTC's merger analysis or afford any weight to the FTC's conclusion that the joint ventures as restructured pursuant to the consent decree would not harm competition.

Judge Fernandez dissented. Clearly dumbfounded by the majority's reasoning, he wrote:

> In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services? I am at a loss for an answer to that question, and nothing written about this case to date imparts additional wisdom or better information.

Id. at 1127.

SUMMARY OF ARGUMENT

This court should grant the petitions for writs of *certiorari* because the United States Court of Appeals for the Ninth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

This Court made clear in *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999), that summary condemnation of an agreement among competitors is appropriate only where "an observer with even a rudimentary understanding of economics" would conclude that the agreement has an anticompetitive effect. Because the Federal Trade Commission concluded after a lengthy review that the challenged agreements are not likely to lessen competition, the Ninth Circuit's decision cannot be squared with the requirements of *California Dental*. Nor can the decision be squared with this Court's other precedents refusing to apply the *per se* rule to the conduct of legitimate joint ventures even where the challenged conduct would otherwise be *per se* unlawful. *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) (henceforth "*BMI*"); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

The Ninth Circuit would not have committed this fundamental error if it had followed this Court's command that the views of the federal antitrust enforcers should be considered in determining whether the *per se* rule applies. In *BMI* this Court recognized that the federal enforcers' review and approval of the challenged conduct was "a unique indicator that the challenged practice may have redeeming competitive virtues," and held that it was error for the court of appeals to "have ignored it completely in analyzing the practice." 441 U.S. at 13. While the views of the federal antitrust enforcers do not bind the courts in subsequent litigation, the Ninth Circuit failed even to discuss or analyze the impact of the Federal Trade Commission's review, and in so doing it not only demonstrated disregard for the conclusions of an expert federal agency, it ignored the requirements of this Court's precedent.

The Ninth Circuit's *per se* condemnation of the agreement also conflicts with this Court's teaching on the relationship between Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1. There are no *per se* rules under Section 7; rather, the statute requires an examination of the facts of the specific acquisition in question to determine the likely impact on competition. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 320-22 (1962). Yet Section 7 also sets a

tougher substantive standard of legality; an acquisition that does not violate Section 7 cannot violate Section 1. *See id.* at 328-29; *see also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963) ("not every violation of § 7, as amended, would necessarily be a violation of the Sherman Act"). Because the challenged conduct was subject to review under both Section 7 and Section 1, *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 167-68 (1964), the Ninth Circuit's summary condemnation under the *per se* rule stands the relationship between Section 7 and Section 1 on its head. The Ninth Circuit's effort to distinguish this case from the analysis applied in a merger because in a merger firms "combine their product lines, or . . . eliminate the old product lines and create an entirely new one," 369 F.3d at 1118, is wrong as a factual matter and finds no support in the precedents of this or any other court.

This is not a case where joint venturers agreed to fix prices or otherwise eliminate competition on their own products sold outside the joint venture. Rather, this agreement on pricing was a fundamental element of the creation of the joint ventures, and is no different from the agreement inherent in *every* acquisition that the acquiring firm will control the acquired firm's pricing after closing the transaction. There is thus no basis to apply a *per se* rule instead of the fact-based analysis required in the merger context.

Finally, the importance of the question presented in the petitions for writs of *certiorari* cannot be gainsaid. Joint ventures have become commonplace because they provide the efficiencies needed to compete successfully in ways that are otherwise unattainable. These efficiencies and the enhanced competition that they facilitate benefit consumers, and thus serve the fundamental consumer welfare goal of the antitrust laws. The Ninth Circuit's decision undermines the very purpose of the antitrust laws by permitting the imposition of treble damages under a *per se* rule even where the joint venture and its conduct are procompetitive and benefit consumers.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Conflicts With Decisions Of This Court Requiring Consideration Of The Context Of The Restraint When Assessing Whether To Apply The *Per Se* Rule.

The Ninth Circuit's decision is a throwback to the days when the *per se* rule was applied to all agreements in any way related to price without regard to their economic context. The court of appeals' fundamental misconception of the role of the *per se* rule can be seen in its conclusion that "it does not matter whether the particular application of the *per se* rule appears inefficient or unfair." 369 F.3d at 1117.[4] In fact, this Court has made clear that the *per se* rule is not to be applied to "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986).

A. The Ninth Circuit Ignored This Court's Command That Summary Condemnation Is Appropriate Only Where The Likelihood Of Anticompetitive Effects Is Obvious.

The examination of actual competitive effects under a rule of reason analysis may be avoided only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on

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[4] The Ninth Circuit cited *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), for the proposition that "[t]he Court has consistently held that the injustice of the rule's broad and uniform application must be addressed to Congress, not the judiciary." 369 F.3d at 1117. But this Court held no such thing in *Professional Engineers*, a case in which it applied the rule of reason, not the *per se* rule. 435 U.S. at 695 (restraint on competitive bidding "must be justified under the Rule of Reason"). Rather, the Court held that the Sherman Act did not recognize arguments that competition itself was an evil to be avoided, and that any exemptions to the Sherman Act were to be sought from Congress, not the courts. *Id.* at 692.

customers and markets." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). By applying the *per se* rule, the Ninth Circuit necessarily concluded that the Federal Trade Commission – which approved the joint venture after a lengthy review – must have lacked the required "rudimentary understanding of economics." The court of appeals' disregard for the economic analysis of FTC, whose "expert opinion" this Court has held "is entitled to great weight," *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 614 (1946), reflects its fundamental misunderstanding of the role of the *per se* rule.

The Ninth Circuit characterized the agreement among the joint venturers that Equilon and Motiva would each charge a single price as a "naked" price fixing agreement subject to *per se* condemnation. 369 F.3d at 1124. This conclusion cannot be reconciled with this Court's precedents, which reject an "overly simplistic and often overbroad" inquiry limited to "whether two or more potential competitors have literally 'fixed' a 'price.'" *BMI*, 441 U.S. at 8-9. A "naked restraint" is one "with no purpose except stifling competition," *White Motor Co. v. United States*, 372 U.S. 253, 263 (1966), and *per se* condemnation is reserved for conduct that is "plainly anticompetitive" and likely to have no "redeeming virtue." *BMI*, 441 U.S. at 9. The *per se* rule has no place when considering an agreement among joint venturers to set the price of a joint venture's output.

The economic integration that accompanies a joint venture holds the promise of better products or lower prices, and a "necessary consequence" of the sale of the joint venture products is that its price must be established. *BMI*, 441 U.S. at 21. Accordingly, there is no *per se* violation where the joint venture sets only the price of products that it manufactures and sells, rather than products sold by the parents. *Id.* at 9. "When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* Similarly, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984), this Court contrasted "horizontal price fixing which [is] is thought so inherently anticompetitive that [it] is illegal *per se* without inquiry into the harm it has actually caused," with "joint ventures," which are "judged under a rule of reason"

because they "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *See generally* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 474 (1966) (*per se* analysis is improper if the restraint "accompanies a contract integration" and "is ancillary to the contract integration").

This Court's decisions in two other joint venture cases involving conduct normally condemned under the *per se* rule similarly show the Ninth Circuit's departure from the law established by this Court. In *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), the Court was faced with a challenge to an NCAA rule limiting the number of college football games that could be broadcast on television. Although an output limitation is "ordinarily condemned as a matter of law under an 'illegal *per se* approach,'" *id.* at 100, the Court applied the rule of reason because the restriction was part of a joint effort that was designed to – and did – "enhance competition." *Id.* at 103.[5] The Court similarly rejected application of the *per se* rule in the joint venture context to group boycotts in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). The "boycott" in *Northwest Wholesale* occurred by operation of a membership rule for a wholesale purchasing cooperative that permitted participating retailers to "achieve economies of scale" and "compete more effectively." *Id.* at 295. *Per se* treatment was inappropriate because membership rules of the type challenged allowed the cooperative "to function effectively" and because, unless the cooperative had market power, "the conclusion that [the rule] is virtually always likely to have an anticompetitive effect is not warranted." *Id.* at 296.

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[5] The restriction on output in *NCAA* was nevertheless condemned under the rule of reason because the restriction on output was not a restriction on the joint venture's output, but that of its members. *See* 468 U.S. at 113 ("The NCAA does not, however, act as a selling agent for any school or for any conference of schools."). Its holding regarding the ultimate legality of the conduct is thus readily distinguishable.

In concluding that the joint venturers' pricing was not "necessary" to the operation of the joint venture and therefore subject to *per se* condemnation, the Ninth Circuit found it "significant that the defendants here did not simply consolidate the pricing decisions within the joint ventures – they *unified* the pricing of the two brands from the time the alliance was formed by designating one individual in each joint venture to set a single price for both brands." 369 F.3d at 1122. The court of appeals did not find it "rational" for the venturers to have ignored "different reputations and customer bases" by setting a single price. *Id.* Indeed, the Ninth Circuit noted that it might have reached a different conclusion if the defendants had "decided to charge the same price for Texaco and Shell gasoline after conducting separate price analyses for each brand, or had they come forward with persuasive evidence that the setting of a single, fixed price was important to accomplishing the legitimate aims of the joint ventures." *Id.* at 1124.[6] This Court's precedents make plain, however, that whether the joint venturers picked the same prices for the two brands or different prices, and whether that price was reasonable or unreasonable, is irrelevant to the question of whether the *per se* rule applies. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*) ("It is no excuse that the prices fixed are themselves reasonable."); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (reasonableness of price set by agreement is irrelevant).

The factors described by the Court in *BMI*, *Copperweld*, *NCAA*, and *Northwest Wholesale* – which do not include how the

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[6] It is unclear whether the Ninth Circuit would have been satisfied had Equilon and Motiva simply set different prices for the two brands, or whether in its view Shell should have set the price for the Shell brand gasoline sold by the joint ventures and Texaco should have set the price for Texaco brand gasoline. If the latter, because Shell holds a minority stake in Motiva and Texaco owns a minority stake in both Equilon and Motiva, an agreement between the parents and a joint venture subsidiary that they do not control might itself be unlawful vertical price fixing. *See Copperweld*, 467 U.S. at 767 (leaving open "under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own").

price is set or whether it is reasonable – required application of the antitrust rule of reason in this case, not the *per se* rule. The joint venture allowed Equilon and Motiva to "compete more effectively." The only joint pricing was of the joint venture's output, a price that had to be set in order for the joint venture to "function effectively." And there was – and could be – no claim that the joint ventures had market power of antitrust concern.

The joint venture cases in which this court has applied the *per se* rule are readily distinguishable. In *Arizona v. Maricopa Medical Society*, 457 U.S. 332, 336 (1982), the "foundations" created by doctors that fixed maximum prices for service were "not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." Rather, "[t]he agreement under attack [was] an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers." *Id.* at 336-37. In *United States v. Topco Associates, Inc.*, 405 U.S. 596, 598 (1972), the Court applied the *per se* rule to a market allocation agreement among participants in a private label grocery joint venture where "[e]ach of the member chains operates independently; there is no pooling of earnings, profits, capital, management, or advertising resources" and where "[t]he association does not itself own any manufacturing, processing, or warehousing facilities, and the items that it procures for members are usually shipped directly from the packer or manufacturer to the members." In contrast, there was no dispute that Equilon and Motiva involved "collective assumption of risk and resource pooling." 369 F.3d at 1111-12.

B. The Ninth Circuit's Decision Conflicts With Decisions Of This Court Requiring Consideration Of The Views Of The Federal Antitrust Enforcers.

The Federal Trade Commission reviewed the creation of the joint ventures and found that, as restructured, they do not harm competition. There was no doubt that the FTC fully understood the nature of the joint venture and that it would eliminate price competition between Shell and Texaco. *See In the Matter of Shell Oil Co.*, Federal Trade Commission Analysis to Aid Public

Comment, 62 Fed. Reg. 67,868, at 67,871 (Dec. 30, 1997). Although some manufacturing joint ventures do not eliminate price competition because they supply product back to the joint venturers for their own pricing, marketing, and sale, *see, e.g.*, *In the Matter of General Motors Corp.*, 103 F.T.C. 374 (1984), that was not the case here. The FTC nevertheless approved the joint ventures as restructured under its consent decree.

This Court's precedent required that the FTC's conclusions be considered by the Ninth Circuit, a mandate that the court of appeals ignored. The Ninth Circuit's failure to consider the views of the FTC and the Commission's efforts to restructure the joint ventures in order to preserve competition should not be countenanced.

BMI, is this Court's seminal case addressing the antitrust treatment of joint ventures. There the Court was called upon to address a private challenge to the blanket licensing policies of ASCAP and BMI, two music licensing organizations. The plaintiff argued that the blanket licenses operated as price fixing agreements among thousands of copyright holders and were thus subject to condemnation under the *per se* rule. The Court rejected application of the *per se* rule, however, in part because ASCAP's conduct had been reviewed by the Antitrust Division of the Department of Justice and modified in response to the Antitrust Division's demands through a consent decree.

The Court held in *BMI* that while review by the Antitrust Division did not immunize the conduct, the review by federal antitrust enforcers militated against summary condemnation under the *per se* rule and that the court of appeals had erred in ignoring it:

> Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties. . . . But it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further

> consideration, supervision, and perhaps invalidation of asserted anticompetitive practices. In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice.

441 U.S. at 13.[7] In this case, the Ninth Circuit merely noted that the "Federal Trade Commission and several State Attorneys General approved the formation of the joint ventures, subject to modifications demanded by both the federal agency and the various Attorneys General." 369 F.3d at 1111. But the court of appeals nowhere analyzed or discussed the significance of this review, in violation of this Court's command in *BMI*.[8]

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[7] Indeed, the Court recognized that it was obligated to consider the Antitrust Division's views as well. *See* 441 U.S. at 16 ("Of course, we are no more bound than is CBS by the views of the Department of Justice . . . . But while we must independently examine this practice, [those views] should caution us against too easily finding blanket licensing subject to *per se* invalidation.").

[8] Other lower courts, in contrast, have recognized that when the federal antitrust enforcers have reviewed and approved a transaction, their conclusions are entitled to careful consideration. *See Advocacy Org. for Patients & Providers v. Mercy Health Servs.*, 987 F. Supp. 967, 974 (E.D. Mich. 1997) (holding that it is a "telling sign that the merger raises no significant anticompetitive concerns" where neither federal agency charged with antitrust enforcement challenges the merger); *Pearl Brewing Co. v. Miller Brewing Co.*, Civ. No. SA-93-CA-205, 1993-2 Trade Cases (CCH) ¶70,370 (W.D. Tex. Mar. 31, 1993), *aff'd*, 52 F.3d 1066 (5th Cir. 1995) (in considering Section 7 challenge to merger, "[t]he fact that [the federal agencies], who presumably have obtained a significant measure of expertise in these matters, have raised no objection to the acquisition is entitled to some consideration by the Court").

In *BMI* this Court looked not only to the Justice Department's consent decree, but also to a brief *amicus curiae* filed by the United States confirming that it "remains of the view" that application of the *per se* rule was inappropriate. *BMI*, 441 U.S. at 15. *Amici* would therefore urge the Court to solicit the views of the United States and of the Federal Trade Commission in its consideration of the petition for writ of *certiorari*.

II. The Ninth Circuit's Decision Conflicts With This Court's Decisions Addressing The Relationship Between Section 7 Of The Clayton Act And Section 1 Of The Sherman Act.

Section 7 of the Clayton Act, 15 U.S.C. § 18, outlaws acquisitions the effect of which "may be substantially to lessen competition." But there are no *per se* rules under Section 7; rather, the statute requires an examination of the facts surrounding the specific acquisition in question to determine the likely impact on competition. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 320-22 (1962). Yet Section 7 also sets a tougher substantive standard of legality than Section 1 of the Sherman Act, 15 U.S.C. § 1. An acquisition that does not violate Section 7 cannot violate Section 1, for "the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act." *Brown Shoe Co. v. United States*, 370 U.S. 294, 328-29 (1962); *see also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963) ("not every violation of § 7, as amended, would necessarily be a violation of the Sherman Act").

In *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 167-78 (1964), this Court held that the creation of a new joint venture corporation is subject to review under both Section 7 of the Clayton Act and Section 1 of the Sherman Act. Given the relationship between Section 7 and Section 1, *Penn-Olin* bars *per se* condemnation of the creation of a new joint venture subject to Section 7 without regard to the absence of anticompetitive effects. Thus, in analyzing the *Penn-Olin* joint venture, this Court remanded to the district court for a fact-specific consideration of whether joint venture violated Section 7, but *rejected* the dissent's contention that the joint venture agreement was a *per se* violation

of Section 1, and indeed found no violation of Section 1 at all. *Penn-Olin*, 378 U.S. at 177-78.[9]

The evaluation of a joint venture under the tougher substantive standard of Section 7 requires a detailed evaluation of market conditions to determine likely competitive effects. *Penn-Olin*, 378 U.S. at 177.[10] By summarily condemning under the *per se* rule a joint venture that was lawful under Section 7, the Ninth Circuit has turned on its head the relationship between Section 7 and Section 1 set forth by this Court in *Penn-Olin*.

The court of appeals' refusal to analyze the joint ventures using merger standards is also inconsistent with the approach of the federal antitrust enforcers. *See* U.S. Dep't of Justice & Federal Trade Comm'n, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), *available at* www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (hereinafter *JV Guidelines*). Under the *JV Guidelines*, a joint venture will be analyzed using merger analysis standards where it involves an efficiency-enhancing integration, ends all competition between the joint venturers in that market, and does not terminate within a limited period by its own specific and

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[9] The Court made the same point in *BMI*, noting that "[m]ergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard." 441 U.S. at 23.

[10] The Court in *Penn-Olin* instructed the trial court to consider a long list of factors in its Section 7 analysis, including:

> the number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; . . . the potential power of the joint venture in the relevant market; . . . and such other factors as might indicate potential risk to competition in the relevant market.

378 U.S. at 177.

express terms. *Id.*, § 1.3.[11] Indeed, the *JV Guidelines* use an example to illustrate the operation of Section 1.3 that is drawn from the creation of Equilon. *JV Guidelines*, Example 1 (hypothetical with fact pattern where "[t]wo oil companies agree to integrate all of their refining and refined product marketing operations" but "maintain separate crude oil production operations").

Regardless, it would make no sense to apply the harsher *per se* test to a joint venture that is something short of a merger. As leading economists have noted, "If the *per se* rule were applied to joint ventures, a paradoxical result would emerge: ventures would be treated more harshly than mergers, although mergers clearly have greater potential for diminishing competition." Carl Shapiro and Robert D. Willig, *On the Antitrust Treatment of Production Joint Ventures*, 4 J. ECON. PERSPECTIVES 113, 119 (1990).

This is not a case where joint venturers agreed to fix prices or otherwise eliminate competition on their own products sold outside the joint venture; the agreement on price relates only to the joint venture's own products. *Cf.* 11 Herbert Hovenkamp, ANTITRUST LAW ¶ 1908e (2002) (there is no "*per se* unlawful price fixing" where "the venturers [do] not enter into any agreement to fix the price of their nonventure output"). In this regard the agreement condemned by the Ninth Circuit as *per se* unlawful is indistinguishable from the agreement inherent in *every* acquisition that the acquiring firm will control the acquired firm's pricing after closing the transaction. *BMI*, 441 U.S. at 23.

The court of appeals held that the fact-based, rule of reason analysis applied in merger cases was inapplicable because the joint ventures would be setting the price of "two . . . distinct product

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[11] *See generally* Gregory J. Werden, *Antitrust Analysis of Joint Ventures*, 66 ANTITRUST L.J. 701, 715-16 (1997) (endorsing similar test and noting that "[m]any transactions reasonably termed joint ventures by their participants have been treated as mergers under the antitrust laws (citing *Penn-Olin*, 378 U.S. at 167-82, *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984), and *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989))).

brands," 369 F.3d at 1124, while in a merger the two firms "combine their product lines, or . . . eliminate the old product lines and create an entirely new one." *Id.* at 1118. The Ninth Circuit provided no citation to authority to justify its conclusion that the "analysis would be different," had it "confronted a joint venture in which former competitors . . . . agreed to merge their current product lines into one collective brand." *Id.* at 1124. The court of appeals' effort to distinguish the merger situation is wrong as a matter of fact – in many mergers the combined firm continues to sell under the brands of both the acquiring and acquired firms. Regardless, the Ninth Circuit cited no precedent for this distinction, and there is no support for it in the merger jurisprudence of this – or any other – court.

The Ninth Circuit's cramped approach to Section 7 analysis thus has the potential to cause chaos not only in the joint venture area, but also in the case of full-fledged mergers. If the Ninth Circuit's view stands, Daimler Benz's acquisition of Chrysler could have been condemned as a *per se* violation of the antitrust laws merely because Daimler and Chrysler agreed at the time of the merger that both brands would be continued but that prices would be set by the merged firm. The decision whether to apply the *per se* rule or the rule of reason does not turn on such arbitrary distinctions.

III. This Case Is Of Great Importance Because Of The Critical And Procompetitive Role That Joint Ventures Play In The American Economy.

The Federal Trade Commission and the Department of Justice noted in their *JV Guidelines* that "to compete in modern markets, competitors sometimes need to collaborate" and "[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs." *JV Guidelines*, Preamble. Firms enter joint ventures "because realizing such benefits may require closer long-term relationships than arms-length market transactions and short-term contracts can provide." Shapiro and Willig, 4 J. ECON. PERSPECTIVES at 114.

Because joint ventures provide the efficiencies needed to compete successfully in ways that are otherwise unattainable, they have become commonplace. This Court noted forty years ago that the economic role of joint ventures had "grown tremendously in the last score of years, having been spurred on by the need for speed and size in fashioning a war machine during the early forties," and that "[p]ostwar use of joint subsidiaries and joint projects led to the spawning of thousands of such ventures in an effort to perform the commercial tasks confronting an expanding economy." *Penn-Olin*, 378 U.S. at 169. Shapiro and Willig's 1990 study determined that "[m]ore than 50 production joint ventures aimed at U.S. production and involving at least one U.S. firm have been formed in each of the last few years, many including large, leading firms." Shapiro and Willig, 4 J. ECON. PERSPECTIVES at 114. *See also* Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 WM & MARY L. REV. 871, 873 (1994) (noting that "the number of new strategic alliances in the United States has nearly doubled in each of the last ten years").

Firms need clear guidance on the antitrust rules of the road before investing millions (or billions) of dollars in a joint venture. "[T]he possibility that an adverse court decision under the *per se* rule would lead to treble damages or to dissolution of a production joint venture under the *per se* rule may deter firms from forming a joint venture that could bring little anticompetitive risk and significant procompetitive efficiencies." Shapiro and Willig, 4 J. ECON. PERSPECTIVES at 119.[12] *See also* Robert Pitofsky, *Joint Venture Guidelines: Views from One of the Drafters*, Remarks before the ABA Section of Antitrust Law Workshop: Joint Ventures and Strategic Alliances: The New Federal Antitrust

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[12] Professors Shapiro and Willig went on to note that "since no case in the past decade has applied the *per se* rule to joint activity involving genuine economic integration of operations, and since so many ventures have been formed between rivals, it appears unlikely that the threat of running afoul of a *per se* ruling is *dramatically* chilling procompetitive collaboration." Shapiro and Willig, 4 J. ECON. PERSPECTIVES at 114. The Ninth Circuit's decision turns that conclusion upside down.

Competitor Collaboration Guidelines (Nov. 11& 12, 1999), *available at* http://www.ftc.gov/speeches/pitofsky/jvg991111.htm (noting that participants in the Federal Trade Commission's 1996 hearings on Global and High-Tech Competition identified joint ventures when asked what area of antitrust law was most uncertain and where the uncertainty led to the business community avoiding transactions that might be legal and efficient).

This Court has repeatedly recognized that joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively," *Copperweld Corp.*, 467 U.S. at 768, and that "a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive." *NCAA*, 468 U.S. at 103. The chaos created by the Ninth Circuit's decision will return us to a time when the business community avoided procompetitive, efficiency-enhancing joint ventures because of fear of crushing treble damages imposed without regard to the absence of actual consumer harm. All consumers will be worse off if that comes to pass.

CONCLUSION

This Court should grant *certiorari* to reverse the decision of the Ninth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States ("Chamber") and the National Association of Manufacturers ("NAM") respectfully move this Court to grant them leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for the petitioners has consented to the filing of this brief, but counsel for respondents has withheld consent.

The Chamber of Commerce of the United States ("Chamber") is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. In furtherance of this mission, the NAM also files *amicus*

curiae briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber and the NAM seek to participate as *amici* here because the decision of the Ninth Circuit below will have demonstrable negative effects on their members. The Chamber and the NAM have a substantial interest in ensuring that legitimate joint ventures (and joint venture partners) will not face *per se* condemnation for pricing its own products, or other basic operating activities necessary for the joint venture to exist. The Chamber and the NAM thus respectfully request this Court to review – and overturn – the decision in the case below.

The Chamber's and the NAM's motion for leave to file the accompanying brief as *amici curiae* should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether it is *per se* illegal concerted action under Section 1 of the Sherman Act for an economically integrated joint venture to set the selling prices for its own products.

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF i

QUESTION PRESENTED iii

TABLE OF AUTHORITIES vi

INTEREST OF THE AMICI 1

SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE PETITION 4

I. Joint Ventures Are Increasingly Important In Today's Economy, And Are Encouraged By The Courts And Antitrust Enforcement Agencies 4

II. The Court Of Appeals Ruling Is Inconsistent With This Court's Precedents And Conflicts With The Decisions Of Several Other Circuits Regarding The Proper Analytical Method For Reviewing Antitrust Challenges To Joint Ventures 7

A. The Court Of Appeals' Application of the *Per Se* Rule To A Bona Fide Joint Venture Is Wrong 8

1. The *Per Se* Rule Is Limited To Facially Anticompetitive Conduct 8

2. Legitimate Joint Ventures Are Analyzed Under the Rule of Reason 8

3. The Court Of Appeals' Ruling That Joint Ventures Are Subject To The *Per Se* Rule Is Inconsistent With This Court's Decisions And Contrary To The Rulings Of Several Circuits 13

B. An Integrated Joint Venture's Operating Decisions Are The Conduct Of A Single Firm, To Which Section 1 Does Not Apply 15

III. The Court Of Appeals' Erroneous Ruling Will Have An Adverse Impact On Legitimate Business Enterprises And On The United States Economy As A Whole 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) 16
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BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI*[1]

The Chamber of Commerce of the United States ("Chamber") is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers,

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the *Amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for petitioners have consented to the filing of this brief, and copies of the letters of consent have been filed with the Clerk of the Court. Because counsel for respondents has refused consent, this brief is accompanied by a motion of *amici* seeking leave to file.

the media and the general public about the vital role of manufacturing to America's economic future and living standards. In furtherance of this mission, the NAM also files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

Many of the *Amici's* members participate in or are otherwise involved with joint ventures, which are ubiquitous in today's global economy. Joint ventures are essential for many American businesses to effectively compete, expand into new markets, make costly investments, and engage in innovation. Recognizing the procompetitive nature of many joint ventures, the prevailing analytical method employed in antitrust challenges is the rule of reason. By instead applying the *per se* rule to a legitimate joint venture's pricing of its own products, the decision in the case below jeopardizes the legal certainty on which businesses have relied. If allowed to stand, the Ninth Circuit's decision will inevitably have a chilling effect on the formation of new, procompetitive joint ventures and place existing joint ventures at risk for *per se* condemnation. For these reasons, *Amici* have a strong interest in the proper resolution of the important issues raised in this case.

SUMMARY OF THE ARGUMENT

Amici fully endorse the arguments advanced by petitioners Shell Oil Company ("Shell") and Texaco, Inc. ("Texaco") in this Court. *Amici* also fully incorporate the statement of facts contained in petitioners Shell's and Texaco's petitions. *Amici's* effort here is to present the reasons for reviewing the Ninth Circuit's decision in a somewhat different light, emphasizing how the Court of Appeals' fundamentally flawed analysis will have a chilling effect on the formation and operation of legitimate, procompetitive joint ventures. In sum, the Ninth Circuit's decision is not only at odds with well-settled principles of antitrust analysis, it is also at odds with the fundamental

purpose of the antitrust laws, which is to *promote* procompetitive economic activity, including joint ventures.

The issues in this case are straightforward, but it is essential to identify what is – and is not – at issue. The following facts are undisputed:

- There is no dispute about the legitimacy of Equilon Enterprises, LLC ("Equilon") as a joint venture, or that its formation was approved by the antitrust agencies, following an in-depth review.
- There is no dispute that the pricing provision in the joint venture agreement came into effect only *after* Shell and Texaco exited the market.
- There is no question that a single individual at Equilon priced its products pursuant to the joint venture agreement.
- There is no dispute that Equilon priced *only* the products that it manufactured and owned.
- Moreover, there is no dispute that Equilon actually produced significant efficiencies and cost savings.

These facts alone should be dispositive as to the proper antitrust principles which should govern this case. Forty years of judicial precedent, agency policy, and scholarly commentary clearly indicate that the rule of reason is the proper mode of analysis for legitimate joint ventures. These authorities also indicate that where a joint venture is integrated, its operating decisions should be viewed as the conduct of a single entity – and not subject to Section 1 at all.

By ignoring these well-settled antitrust principles, the Court of Appeals has created an environment that is hostile to the formation and operation of joint ventures. As explained more fully below, this decision must be reviewed by this Court to reverse this result. In summary, *Amici* will argue as follows:

- *First*, *Amici* will provide context necessary to illustrate the impact of the Court of Appeals' decision by reviewing the pervasive use of joint ventures in today's economy – as well as the tangible procompetitive benefits joint ventures are uniquely able to provide.
- *Second*, *Amici* will discuss the Court of Appeals' principal legal error of applying the *per se* rule to a legitimate joint venture. *Amici* will also demonstrate that the Court of Appeals erred in considering a joint venture's pricing of its own products to be concerted action.
- *Finally*, given the significance of joint ventures, *Amici* will explain that review is urgently needed to correct the uncertainty created by the Court of Appeals' decision. Unless reviewed by this Court, the decision threatens to chill the formation and operation of legitimate and procompetitive joint ventures, and also raise the specter of meritless antitrust litigation.

For these reasons, *Amici* respectfully request this Court to review and overturn the Court of Appeals' decision.

REASONS FOR GRANTING THE PETITION

I. Joint Ventures Are Increasingly Important In Today's Economy, And Are Encouraged By The Courts And Antitrust Enforcement Agencies

Joint ventures encompass a wide variety of business relationships in which two or more firms work together to engage in business activities, such as marketing, production, research and development, distribution, sales or purchasing. *See* U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* § 1.1 (2000) , *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) [hereinafter Antitrust Guidelines]. In 1964, this Court wrote, "[i]t is said that joint ventures were utilized in ancient times . . . . Their economic significance has

grown tremendously in the last score of years . . . ." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 169 (1964). In the forty years since *Penn-Olin*, joint ventures have become an even more important and widely utilized economic form. One recent study noted that more than 5,000 joint ventures have been launched in the past five years. James Bamford et al., *Launching A World-Class Joint Venture*, Harv. Bus. Rev. 1 (2004). In addition, 2000 data show that the largest 100 joint ventures represented more than $350 billion in annual revenues. *Id.*

Available data provide examples of the economic benefits joint ventures generate.

- Joint Ventures Create More Jobs: Companies involved in joint ventures are disproportionately responsible for new hiring. In a 2000 study, 81% of joint venture participants planned to hire new workers in the subsequent 12 months, resulting in 29% more new hires for those involved in joint ventures.[2]
- Joint Ventures Are Responsible For Increased Capital Investment: Joint venture participants are 58% more likely to make major new investments. Overall 85% more will be spent by those in joint ventures. *See* note 2, *supra*.
- Joint Ventures Invest More Broadly: "Compared to their counterparts on the sidelines, more CEOs involved in JVs are planning to increased spending in virtually all investment categories." *See* note 2, *supra*.

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[2] PricewaterhouseCoopers, *Trendsetter Barometer: Joint Ventures Providing High Traction for America's Fastest Growing Companies and the Economy* (Nov. 6, 2000), *at* http://www.barometersurveys.com (last visited Dec. 19, 2004). This study involved interviews of 421 CEOs of product and service companies identified in the media as the "fastest growing U.S. businesses" from 1995-2000.

- Joint Ventures Are Prevalent Across Industry: 2000 data suggests that 36% of service companies are participating in joint ventures, while 29% of product companies are participating. *See* note 2, *supra*.
- Joint Ventures Are Efficient: Companies involved in joint ventures expected to contribute 10.6% of their business assets to joint ventures in 2000, yet generate 12.0% of their revenue growth in return – with these figures growing in subsequent years. *See* note 2, *supra*.

The overall economic benefits afforded by joint ventures have been recognized by this Court, which stated that "joint ventures . . . hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). Commentators likewise recognize the economic benefits joint ventures generate. *See, e.g.*, Ernest Gellhorn & W. Todd Miller, *Joint Ventures and Standard-Setting: Problems in the Current Framework, at* http://www.ftc.gov/opp/global/gellhorn.htm (1995) [hereinafter Gellhorn & Miller, *Current Framework*] ("The potential benefits from joint ventures . . . to product innovation and increased competition make it particularly important that they be encouraged to operate within a competitive framework with guidance from antitrust agencies."); Robert Pitofsky, *A Framework for Antitrust Analysis of Joint* Ventures, 74 Geo. L.J. 1605, 1606-07 (1986) ("[joint ventures] can have substantial and direct procompetitive effects. . . . [J]oint ventures are devices that frequently achieve legitimate business advantages. . . ."); *see also* Howard H. Chang et al., *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223 (1998).

Moreover, joint ventures form for a variety of reasons. For example, some joint ventures are formed to generate efficiencies while others are formed to introduce a new product. However, under the antitrust laws, both types of

joint ventures are equally valid. As former FTC Chairman Robert Pitofsky explained, "an 'efficiency-enhancing integration of economic activity' is not limited to circumstances in which the collaboration 'creates a new product.' If the agreement improves quality or service, reduces price or increases incentives for innovation, all of those qualify as well." Robert Pitofsky, *Joint Venture Guidelines: Views from One of the Drafters*, A.B.A. Sec. of Antitrust Law Workshop at 4 (1999), at http://www.ftc.gov/speeches/pitofsky/jvg91111.htm. In this regard, such efficiency-generating joint ventures may also be preferable to mergers. *See, e.g.*, Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1, 8 (1991) ("Economists have long recognized that the integration of assets that occurs in a merger may lead to competitive efficiencies. From an antitrust standpoint, it is preferable to achieve efficiencies through joint ventures rather than by mergers.").

Legitimate joint ventures thus enable firms to effectively compete, expand, innovate, and contribute to the health of the economy. The overwhelming consensus that these procompetitive benefits will be taken into account in assessing the legality of joint ventures under the antitrust laws has been a key consideration to the many firms that have entered into joint venture relationships. As discussed below, the Court of Appeals' decision in the instant case undermines this legitimate expectation and flies in the face of decades of antitrust jurisprudence, raising the specter of *per se* antitrust liability for participants in legitimate, efficiency enhancing joint ventures.

II. The Court Of Appeals Ruling Is Inconsistent With This Court's Precedents And Conflicts With The Decisions Of Several Other Circuits Regarding The Proper Analytical Method For Reviewing Antitrust Challenges To Joint Ventures

A. The Court of Appeals' Application Of The *Per Se* Rule To A Bona Fide Joint Venture Is Wrong[3]

1. The *Per Se* Rule Is Limited To Facially Anticompetitive Conduct

Under the *per se* rule, conduct is conclusively presumed to be illegal "without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." *National Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). This Court has made clear that the *per se* rule is reserved for a narrow category of conduct that "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979); *accord N. Pac. Ry.*, 356 U.S. at 5 (limiting the *per se* rule to conduct that has a "pernicious effect on competition and lack[s]. . . any redeeming virtue"). This Court has also cautioned against the expansion of the *per se* rule, given the risk that conduct "designed to 'increase economic efficiency and render markets more, rather than less competitive'" could be summarily condemned. *See BMI*, 441 U.S. at 19-20 (citation omitted). *See also United States v. Topco Assocs. Inc.*, 405 U.S. 596, 607-08 (1972) ("[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act."). The Court of Appeals' decision ignored this Court's teachings and instead applied the *per se* rule to a legitimate joint venture that had produced demonstrable efficiencies. This decision is clearly wrong.

2. Legitimate Joint Ventures Are Analyzed Under the Rule of Reason

Consistent with the foregoing principles, this Court has taught that antitrust challenges to the formation or operation

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[3] The *Amici* fully endorse the arguments advanced by petitioners Shell and Texaco before this Court concerning this issue.

of bona fide joint ventures should be analyzed under the rule of reason. *See Copperweld*, 467 U.S. at 768 ("joint ventures . . . are judged under a rule of reason.").[4] Overall, this Court explained, "the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy." *Penn-Olin*, 378 U.S. at 170. This Court has also cautioned against overly-literal application of the Sherman Act in joint venture analysis, *BMI*, 441 U.S. at 23.[5] Explaining this admonition, the *BMI* Court wrote that "[w]hen two partners set the price of their goods or services, they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* at 9; *see also NCAA v. Board of Regents*, 468 U.S. 85, 117 (1984) (rejecting the *per se* rule to analyze of a joint venture's conduct).

Following this Court's teaching, the First, Second, Seventh, Eleventh, and D.C. Circuits have eschewed the *per se* rule and instead applied the rule of reason in antitrust challenges to legitimate joint ventures. *See, e.g., Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001); *United States v. Visa U.S.A.*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996); *Polk Bros, Inc. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985); *N. Bancard Corp. v. Visa U.S.A.*, 779 F.2d 592 (11th

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[4] Of course, where a joint venture is a mere cover for a cartel (in other words, a "sham"), *per se* condemnation is appropriate. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

[5] *See also Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 413-14 (2004) (cautioning generally against overbroad application of the antitrust laws given the risk of false positives that would chill the very type of conduct that the antitrust laws should seek to encourage).

Cir. 1986); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986). In summary, this Court and several federal circuits all conclude that legitimate joint ventures are analyzed under the rule of reason. This judicial consensus provides necessary legal guidance for companies that participate in joint ventures. The legal errors committed by the Court of Appeals thus create a serious circuit split, the impact of which will resonate throughout the business community.

The Ninth Circuit's decision not only breaks with legal precedent, it also deviates from the sound policy decisions of the antitrust agencies, and the studied analysis of antitrust scholars – all of which unanimously support the application of the rule of reason to procompetitive joint ventures.

First, the antitrust enforcement agencies – the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") – have developed policies to encourage the use of procompetitive joint ventures. As Chairman Pitofsky explains, "[w]e accept that joint ventures are a common and useful device in an economy that is increasingly involved in global competition . . . ." Pitofsky, *Views from One of the Drafters*, at 2. The agencies' approach is best depicted by the promulgation of guidelines applicable to joint ventures, all of which make clear that legitimate joint ventures are analyzed under the rule of reason.

- *Antitrust Guidelines for Collaborations Among Competitors*. When reviewing the formation of a joint venture, the agencies apply an analysis similar to that employed for merger review – in other words, a rule of reason analysis. The rule of reason also applies to agreements concerning price, provided the agreement is reasonably related to the legitimate objectives of the joint venture. 4 Trade Reg. Rep. (CCH) ¶ 13,161.

- *DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care*. Although designed for the health care industry, these guidelines also recite general antitrust law principles applicable to joint ventures – *i.e.*, that joint ventures should be analyzed under the rule of reason.[6] 4 Trade Reg. Rep. (CCH) ¶ 13,152 (1994) [hereinafter "Health Care Guidelines"]
- *Antitrust Guidelines for the Licensing of Intellectual Property*. Designed specifically for intellectual property, these guidelines likewise indicate that joint ventures are analyzed under the rule of reason. 4 Trade Reg. Rep. (CCH) ¶13,132 (1995)

Moreover, antitrust commentators reviewing existing judicial precedent overwhelmingly agree that "antitrust generally begins its analysis [of joint ventures] with a presumption of legality. Joint ventures are to be condemned or restrained only if the opportunities for increased exercise of market power appear significant in proportion to likely benefits." XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2121b, at 126-27 (2d ed. 2005). As Chairman Pitofsky stated, "[i]t seems all but unanimous that *per se* rules are inappropriate for joint venture analysis and that rule of reason review will prevail." Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures* at 1621-22. Joseph Brodley likewise wrote that "[t]he guiding legal principle is [that] the Rule of Reason [applies to joint ventures], except in cases of flagrant cartel practices . . . ." Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1535 (1982). The American Bar Association Antitrust Section summarized antitrust treatment of joint ventures, stating that "an arrangement qualifies for rule of reason analysis as a joint

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[6] Statements 2, 3, and 8 specifically anticipate joint price setting, and make clear that when such conduct is reasonably related to the legitimate objectives of the joint venture, it is subject to rule of reason analysis.

venture when it involves some potential for an efficiency-generating integration of the parties' resources." 1 *Antitrust Law Dev.* 414 (5th ed. 2002). *See also* Gregory J. Werden, *Antitrust Scrutiny of Joint Ventures*, 66 *Antitrust L.J.* 701, at 11 (1998) ("The *per se* rule should not be applied if an integration is reasonably calculated to achieve social benefits . . . .").

Elaborating on judicial precedent, antitrust commentators and the antitrust agencies have explained that joint price setting is often necessary in cases of joint ownership of a good or service being sold. Echoing this Court's admonition in *BMI*, Professor Hovenkamp explains that "if two siblings inherit a house... and decide to sell it to a stranger, they will have to agree with each other on the price at which the house is sold.... When the joint owners are also competitors, the result is literally 'price fixing,' but it is a form of price fixing that should, when bona fide, be examined under the rule of reason." XIII Hovenkamp, ¶ 2132c, at 179-80 (2005). *See also* Hovenkamp, *Federal Antitrust Policy*, at 213 (1999) (structural analysis akin to merger analysis should apply where a joint venture permits parties to coordinate prices or output and has the "clear potential to produce substantial economies"). *See also Antitrust Guidelines*, § 3.2, *Health Care Guidelines*, Statements 2, 3 and 8 (expressly prescribing the rule of reason analysis where joint prices are set by legitimate joint ventures). Moreover, as discussed in Section II.B, *infra*, many courts and commentators treat the operational decisions of joint ventures in the marketplace as the decisions of a single firm, and thus not subject to Section 1 of the Sherman Act at all.

In summary, this Court's teachings and the precedent of several circuits make clear that legitimate joint ventures are analyzed under the rule of reason, to the extent that they are subject to Section 1. The Ninth Circuit's view that those decisions may be subject not just to rule of reason scrutiny

but also *per se* liability is inconsistent with antitrust doctrine and policy.

3. The Court Of Appeals' Ruling That Joint Ventures Are Subject To The *Per Se* Rule Is Inconsistent With This Court's Decisions And Contrary To The Rulings Of Several Circuits

Amici endorse the discussion of Petitioners Shell and Texaco advanced before this Court concerning the errors of the Court of Appeals' decision in the instant matter. As noted above, *Amici* view as paramount the need to resolve the conflict between the Ninth Circuit decision in this case and forty years of judicial precedent and policy, and thus focus on the Court of Appeals' errors with respect to its decision to apply the *per se* rule.

The Ninth Circuit relied on inapposite case law and created considerations not typically evaluated under the antitrust laws to justify the application of the *per se* rule. The Court of Appeals also stated that Petitioners sought an "exception" to the *per se* rule. *Dagher et al. v. Saudi Refining, Inc., et al.*, 369 F.3d 1108, 1116 (9th Cir. 2004). Again, the Ninth Circuit was wrong – no exception was sought, and petitioners were not seeking lenient treatment. As Chairman Pitofsky explained, the fact that the *per se* rule should not be applied to a joint venture "doesn't mean it is legal – only that more extended analysis is required." Pitofsky, *Views from One of the Drafters*, at 4.

As its primary authority for applying the *per se* rule, the Court of Appeals' majority opinion relied heavily on three cases, none of which support its ultimate conclusion.[7] *See Dagher*, 369 F.3d at 1118-20. In the instant case, the Court of Appeals reviewed a legitimate, integrated joint venture's

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[7] The *Amici* agree with and wholly endorse the legal analysis set forth in petitioners Shell's and Texaco's petitions before this Court.

pricing of the products it produced and owned. In contrast, *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) did not involve a fully integrated joint venture. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) did not involve a legitimate joint venture. Finally, in *NCAA*, 468 U.S. at 117, the Court did not apply the *per se* rule, even to a restraint less integral to the joint venture than the restraint at issue here. These cases simply do not justify the application of the *per se* rule in the instant case.

Despite a paucity of legal authority, the Court of Appeals' analysis continued, relying on factors that typically do not implicate the antitrust laws, and thus raising considerable concern among the business community.

First, the Court of Appeals cited as evidence of price fixing the joint venture agreement in which Shell and Texaco "unified" the pricing of the Texaco and Shell brands. *Dagher*, 369 F.3d at 1120. However, as a matter of sound business planning such, "[j]oint venture agreements typically contain restraints on such economic variables as price, output, operating costs, territories and customers, and access to the joint venture." Irving Scher, *Antitrust Adviser*, § 3.46, 3-152 (4th ed. 2004). Such provisions are not condemned under the *per se* rule where they are reasonably related to the procompetitive objective of the joint venture. *Id.* In the instant case, as Judge Fernandez's dissent recognized, a joint venture needs to sell – and hence price – its products even to exist. *Dagher*, 369 F.3d at 1127. Consequently, the proper mode of antitrust analysis is the rule of reason.

Second, the Court of Appeals relied on the fact that Shell and Texaco products were set at the same price. *See Dagher*, 369 F.3d at 1122. Antitrust principles, however, do not require a joint venture's products to be priced separately. As Petitioners Shell and Texaco have clearly explained, antitrust law does not consider the *reasonableness of a particular price* set by a joint venture. *See* Texaco Pet. at 22; Shell Pet. at 16. Rather, the review is of the decision to

set the price in the first place. Pricing is a crucial operating decision of any business. The Court of Appeals' decision effectively singles out joint ventures and joint venture partners for special scrutiny of their pricing decisions, a result not justified by sound economic or legal theory.

Finally, the Court of Appeals cited as evidence of price fixing the fact that the joint venture was pricing *existing* products, as opposed to a *new* product. *See Dagher*, 369 F.3d at 1124. This suggests that the antitrust laws treat joint ventures formed for the purpose of creating a new product differently than those formed to generate efficiencies. However, efficiency-creating joint ventures are just as valid under the antitrust laws as joint ventures that introduce new products. *See* Pitofsky, *Views from One of the Drafters*, at 4. In sum, the implication that a joint venture must introduce a new product to escape *per se* antitrust liability is not supported by legal precedent, economic theory, or antitrust policy.

In summary, the Court of Appeals' decision not only inappropriately subjects joint ventures and joint venture partners to the *per se* rule, it runs contrary to well-settled policy, discourages sound and responsible business planning, and limits the flexibility of businesses to make critical operating decisions. For all of these reasons, this erroneous outcome must be reviewed by this Court.

B. An Integrated Joint Venture's Operating Decisions Are The Conduct Of A Single Firm, To Which Section 1 Does Not Apply

As discussed above, the application of the *per se* rule to a legitimate joint venture's formation and operation was fundamentally wrong, since it is well-settled that the rule of reason is the presumptive mode of analysis. The Court of Appeals, however, also ignored the conclusions of many courts and commentators that the unilateral operating decisions of joint ventures should be treated as those of a

single firm – and thus not subject to Section 1 scrutiny in the first place.[8]

This Court has stated that "[i]n such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982); *see also NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) ("the league competes as a unit against other forms of entertainment") (Rehnquist, dissent). Several Circuits have likewise held that joint ventures should be analyzed as a single firm when engaging in ordinary marketplace activities. *See Chicago Professional Sports Ltd. v. NBA*, 95 F.3d at 600 ("the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment."); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110-11 (3d Cir. 1980) (finding that such unilateral action, "no matter what its motivation, cannot violate § 1."); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274 (8th Cir. 1988) ("a conglomeration of two or more legally distinct entities cannot conspire among themselves...."). Professor Areeda's treatise underscores the point: "In general, once a venture is judged to have been lawful at its inception... its decisions should be regarded as those of a single entity rather than the parent's daily conspiracy on every purchase-sale-hiring-licensing choice." VII Phillip E. Areeda, *Antitrust Law*, at 535 (1986), *quoted in* Werden, *Antitrust Scrutiny of Joint Ventures*, 66 Antitrust L.J. 701, at n. 17; *see also* Werden, *Antitrust Scrutiny of Joint Ventures*, 66 *Antitrust L.J.* 701, at 4 & n.18.

Important policy reasons underscore the need to treat a joint venture as a single entity for purposes of antitrust challenges. For example, "[t]reating joint ventures as single

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[8] The *Amici* wholly endorse Petitioner Texaco's arguments advanced before this Court related to this issue.

entities for limited purposes allows meritless . . . price-fixing claims, which could erroneously be decided under the *per se* rule, to be rejected as a matter of law." Werden, 66 Antitrust L.J. at 4 n.18. *See also* Donald I. Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 Utah L. Rev. 999 (1993); Chang, *Some Economic Principles For Guiding Antitrust Policy Toward Joint Venture*, 1998 Colum. Bus. L. Rev. 223 (1998).

In the instant case, the Court of Appeals concluded that Equilon's pricing decisions constituted concerted action. *Dagher*, 369 F.3d at 1116. The undisputed facts of the case, however, indicate otherwise. First, the joint venture agreement was not implemented until Equilon was formed, and there is no allegation of "gun jumping" in this case. In addition, a single individual at Equilon was responsible for setting the price of the products it produced and owned. Finally, Shell's and Texaco's involvement was limited to standard transitional planning associated with the formation of a joint venture. *See Dagher*, 369 F.3d at 1111-13. Such planning is generally required in order to form a joint venture in the first place. *See, e.g.*, J. Paul McGrath, *Antitrust Problems In Negotiating A Joint Venture Agreement*, 54 *Antitrust L.J.* 971, 973 (1985) ("[J]oint ventures frequently require more advanced planning, even before negotiations, and before negotiations leading to a renewal or modification of an existing joint venture."). Nonetheless, the Court of Appeals erroneously concluded that Equilon's pricing of its own products constituted concerted action.

The Court of Appeals' decision in the instant case is inconsistent with the position taken by this Court, the Third, Seventh, and Eighth Circuits, and respected commentators. In addition, the decision reflects neither the legal nor practical realities of joint ventures, and this misunderstanding, if allowed to perpetuate, would cast serious doubt over the viability of joint ventures going forward.

III. The Court Of Appeals' Erroneous Ruling Will Have An Adverse Impact On Legitimate Business Enterprises And On The United States Economy As A Whole

It is critical that this Court review – and overturn – the Court of Appeals' decision. The precedent set by the Court of Appeals will have a demonstrable negative effect, which will reverberate throughout the United States economy.

The facts and issues of the instant case are straightforward and can be clearly and efficiently resolved by this Court. The District Court correctly granted summary judgment since (1) the operative, undisputed facts did not raise a material issue as to *per se* price fixing; and (2) the plaintiffs disclaimed any reliance on the rule of reason. The Court of Appeals erred in reversing, and concluding that the *per se* rule applies to a legitimate joint venture's pricing of its own products. As discussed below, the implications of allowing the Court of Appeals' decision to stand are serious and far-reaching.

First, the Court of Appeals' decision will have a significant chilling effect on the formation and operation of legitimate joint ventures, given the serious risk of *per se* antitrust liability for conduct previously (and properly) analyzed under the rule of reason. Businesses forming legitimate joint ventures do so with the understanding that, to the extent it is subject to Section 1 of the Sherman Act, it will be analyzed under the rule of reason. This is expressed in the antitrust jurisprudence and literature discussed throughout this brief, and also in basic business planning texts. *See, e.g.*, 13 Zolman Cavitch, *Business Organizations With Tax Planning*, § 172.04[2], 172-103 (2003) ("[T]he principal mode of antitrust analysis for evaluating the legality of a joint venture has been essentially the same as that used for a merger or acquisition."). The Court of Appeals' decision eliminates the certainty of rule of reason treatment for legitimate joint ventures. Indeed, the *only*

certainty created by the Court of Appeals' decision is the certainty that a legitimate joint venture's pricing of the products it owns and manufactures can be held *per se* illegal. Overall, this creates an environment in which potential joint venture partners will be unlikely to form a joint venture since the negotiations, agreements, and the subsequent operations could be subject to *per se* condemnation. As a consequence, the formation of joint ventures will be chilled, resulting in the loss of the significant procompetitive benefits that joint ventures uniquely provide. This loss will be harmful to the business community, as joint ventures may be not be considered a viable economic form in light of antitrust risk. Moreover, the loss will also harm the U.S. economy as a whole, given the ubiquity of joint ventures in virtually every segment of the economy, and their disproportionate responsibility for investment and hiring. *See* Section I, *supra*.

Second, the Court of Appeals' decision is also likely to trigger an extension of the *per se* rule that would leave joint ventures completely untenable as an economic form. The instant case held that a joint venture's pricing of the products it produced and owned could be *per se* illegal. However, while pricing is a critical operational activity, it is only one of many operating decisions made by joint ventures. For example, a joint venture must make decisions concerning output, operating costs, territories, and customers. If the Court of Appeals' decision is allowed to stand, the *per se* rule could easily be extended to condemn such operating decisions. As discussed throughout this brief, there is no basis in antitrust law or policy to summarily condemn the business decisions made by legitimate joint ventures. The Court of Appeals' decision thus extends the *per se* rule, placing legitimate business practices at risk for summary condemnation, notwithstanding the procompetitive or efficient nature of the joint venture.

Finally, the Court of Appeals' decision will encourage widespread – and frivolous – antitrust lawsuits against joint ventures of all sizes, in all industries, and in all parts of the United States. The possibility of treble damages will likely prove inviting if a joint venture's legitimate conduct can condemned under the *per se* rule. Moreover, litigation would not be limited geographically. Antitrust cases have nationwide service of process, and joint ventures typically have a broad geographic scope. Taken together, the uncertainty of the law, the threat of *per se* condemnation for critical business decisions, and the threat of treble damages and frivolous litigation, creates an environment in which joint ventures simply will not form, leaving businesses with no choice other than to utilize less efficient economic forms. It also exposes the thousands of existing joint ventures to unfair and unanticipated antitrust liability.

In summary, the Court of Appeals' decision in the case below reaches a surprising and wrong result, which conflicts directly with forty years of antitrust jurisprudence. The Court of Appeals essentially equates legitimate joint ventures with price fixing cartels, concluding that both should be subjected to the *per se* rule. This will undoubtedly chill the formation and operation of legitimate joint ventures and consequently chill the type of economic benefits that joint ventures offer – product innovation, investment, and job creation. This Court should take the opportunity to review this case and provide needed clarity to the business community, to ensure that joint ventures remain a viable economic form, and that legitimate, procompetitive and efficient joint ventures are not subjected to the unwarranted specter of *per se* condemnation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* VISA U.S.A. INC., THE COCA-COLA COMPANY AND MICROSOFT CORPORATION IN SUPPORT OF PETITIONERS SHELL OIL COMPANY AND TEXACO, INC.

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VISA U.S.A. INC., THE COCA-COLA COMPANY and MICROSOFT CORPORATION

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Visa U.S.A. Inc. ("Visa"), The Coca-Cola Company ("Coca-Cola") and Microsoft Corporation ("Microsoft") respectfully move this Court for leave to file the brief submitted herewith, as *amici curiae* in support of the Petitions for Writ of *Certiorari* filed by Shell Oil Company and Texaco, Inc.

Petitioners have given a blanket consent to the filing of any *amicus* briefs; respondents refused to consent to the filing of this brief.

As set forth in the accompanying brief, *amici* Visa, Coca-Cola and Microsoft seek to bring to the attention of this Court the importance of the legal principles raised in this case to the establishment and operation of joint ventures, and the significant risks posed by the Ninth Circuit's decision—beyond the immediate facts of this case—to a broad range of ventures operating across the American economy. The present petitions represent an important, and much-needed, opportunity for this Court to reconcile the vastly divergent approaches to joint venture analysis that currently exist among the lower courts. Without such clarification, firms which participate in joint ventures will continue to be exposed to the danger of condemnation for single-firm conduct that should not be actionable at all under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). By raising the specter of *per se* liability for internal decisions that are fundamental to the very purpose for which the joint venture involved in this case was formed, the majority has created a demonstrably mistaken and dangerously threatening precedent for all joint ventures.

Accordingly, *amici* respectfully request leave to file the brief submitted herewith.

Respectfully Submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE WRIT	6
A. Joint Ventures Are Of Great Importance To American Commerce And Should Be Fostered Under The Antitrust Laws	6
B. Certiorari Should Be Granted To Affirm That Section 1 Has No Application To A Fully Integrated Joint Venture Carrying On The Business For Which It Was Created	9
C. Certiorari Should Be Granted To Consider When Section One Applies To An After-The-Fact Attack On The Formation Or Permissible Scope Of A Joint Venture	13
D. Certiorari Should Be Granted To Provide Business With Needed Guidance Regarding The Applicability Of Section 1 To Joint Ventures	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
3M Co. v. LePage's, Inc., 124 S.Ct. 2932 (2004)	20
Arizona v. Maricopa County Med. Society, 457 U.S. 332 (1982)	8, 11
Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)	19
Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979)	2, 16
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988)	16
California Dental Ass'n v. Federal Trade Commission, 526 U.S. 756 (1999)	16
Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918)	19
Chicago Prof. Sports Ltd. P'ship v. NBA, 95 F.3d 593 (7th Cir. 1996)	8, 11, 12
City of Mt. Pleasant, Iowa v. Assoc. Elec. Coop., 838 F.2d 268 (8th Cir. 1988)	11
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)	16
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)	*passim*
In re Polygram Holding, Inc., No. 9298, 2003 FTC LEXIS 120 (F.T.C. July 24, 2003)	9, 17

	Page
In the Matter of Chevron Corporation/Texaco Inc., Statement of Sheila Anthony and Mozelle W. Thompson, Docket No. C-4023, F.T.C (2002)	11, 12
In the Matter of Shell Oil Company, 125 F.T.C. 769, Consent Order (April 21, 1998)	13, 14
Nash v. United States, 229 U.S. 373 (1913)	19
Nat'l Bancard Corp. v. Visa U.S.A. Inc., 779 F.2d 592 (11th Cir. 1986)	1
Nat'l Soc. of Professional Engineers v. United States, 435 U.S. 679 (1978)	19
NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984)	2, 7
NFL v. North Am. Soccer League, 459 U.S. 1074 (1982)	19
Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985)	2
Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986)	16
SCFC ILC, Inc. v. Visa U.S.A. Inc., 36 F.3d 958 (10th Cir. 1994)	1
Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)	19

Page

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899) 16

United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) 13, 18

United States v. Visa U.S.A. Inc., 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *modified in part on other grounds*, 183 F. Supp. 2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 45 (October 4, 2004) 1

Statutes

15 U.S.C. § 1 3

15 U.S.C. § 2 16

15 U.S.C. § 18 4

Other Authorities

Federal Trade Commission & Department of Justice Antitrust Division, *Antitrust Guidelines For Collaborations Among Competitors*, 4 Trade Reg. Rep. (CCH) § 13 (2000) 11, 12

Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701 (1998) 7

H. Chang, D. Evans and R. Schmalensee, *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223 (1998) 7, 8

	Page
Peter Pekar, Jr. and Mark S. Margulis, *Equity Alliances Take Center Stage*, 14:2 Bus. Rev. 50 (2003)	6
Thomas A. Piraino, Jr., *A Proposed Antitrust Approach To Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001)	6, 8, 9
Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871 (1994)	7
V P. Areeda and H. Hovenkamp, *Antitrust Law* ¶1205 (2d ed. 2003)	16, 17
VII P. Areeda, *Antitrust Law* ¶1478c (1986)	11
VII P. Areeda and H. Hovenkamp, *Antitrust Law* ¶1477 (2d ed. 2003)	3
VII P. Areeda and H. Hovenkamp, *Antitrust Law* ¶1478c (2d ed. 2003)	11
XI H. Hovenkamp, *Antitrust Law* ¶1906d (1998)	12
XI H. Hovenkamp, *Antitrust Law* ¶1907c (1998)	7
XI H. Hovenkamp, *Antitrust Law* ¶1908e (1998)	12
XIII H. Hovenkamp, *Antitrust Law* ¶2121b (1999)	7

This brief is respectfully submitted on behalf of Visa U.S.A. Inc., the Coca-Cola Company and Microsoft Corporation, as *amici curiae* in support of petitioners, Texaco, Inc. and Shell Oil Company, who have separately filed petitions for writs of certiorari from the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

INTEREST OF *AMICI*

Amici have a particular—but by no means unique—interest in this case.[2] Like all businesses, *amici* seek predictability and certainty in the legal rules under which they operate. However, the Ninth Circuit's decision in this case *compounds* the uncertainty that businesses face when planning, entering into and operating joint ventures. That uncertainty does significant harm to this form of business organization and, as a consequence, to the beneficial competitive efficiencies they create.

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[1] This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel. Petitioners have filed with the Court a blanket consent to the filing of *amicus* briefs; respondents have refused their consent. Accordingly, the requisite motion for leave under Rule 37 of the Rules of United States Supreme Court is filed with this brief.

[2] Visa U.S.A. Inc. ("Visa") is one of the world's largest joint ventures and a participant in an international payment system which generates more than $3 trillion in annual card sales volume. Visa has been a party to some of the most significant antitrust cases relating to joint ventures over the past two decades. *See Nat'l Bancard Corp. v. Visa U.S.A. Inc.*, 779 F.2d 592 (11th Cir. 1986); *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994); and *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *modified in part on other grounds*, 183 F. Supp. 2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 45 (October 4, 2004). The Coca-Cola Company and Microsoft Corporation participate in numerous joint ventures around the world and desire to plan and enter into future ventures with a clear understanding of the U.S. antitrust laws that will apply to such arrangements.

The consequences of the Ninth Circuit's seriously flawed decision for petitioners, *amici* and all businesses planning or operating joint ventures are significant and justify review by this Court. This case has revealed a gulf between the principal antitrust regulators and the Ninth Circuit in their respective approaches to fully integrated marketing and distribution joint ventures. That the former saw no basis for liability, whereas the latter required the petitioners to disprove the unreasonableness of the venture, leaves businesses—and the professionals who advise them—in a quandary. *Amici*—and all businesses—require a restoration of common sense and predictable rules to the analysis of joint ventures under the antitrust laws. Accordingly, *amici* support the petitions for writ of certiorari.

SUMMARY OF ARGUMENT

1. The present petitions represent an important, and much-needed, opportunity for this Court to reconcile the vastly divergent approaches to joint venture analysis that currently exist among the lower courts. Without such clarification, firms which participate in joint ventures will be exposed to increased danger of condemnation, on a *per se* basis no less, for single-firm conduct that should not even be actionable at all under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

This Court has recognized the significant procompetitive benefits that joint ventures can generate. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). By raising the specter of *per se* liability for internal decisions that are fundamental to

the very purpose for which the joint venture involved in this case was formed, the Ninth Circuit has created a demonstrably mistaken and dangerously threatening precedent for all joint ventures, thereby materially undermining their utility as a form of business enterprise.

2. The fundamental question at the heart of this case is whether a fully integrated entity—one that involves a legitimate sharing of risk and reward—should be subject to potential liability under Section 1 of the Sherman Act, 15 U.S.C. § 1, for doing those things it was created to do. The principal regulators charged with enforcing the antitrust laws determined that the parties' joint venture was a single entity, and that its creation should be viewed as a complete merger of all of Texaco's and Shell's downstream operations. Under *Copperweld*, that should be the end of this case. Yet, the Ninth Circuit not only ignored those regulatory determinations but, effectively, treated the joint venture as pretextual by holding its pricing decisions subject to *per se* liability. The result of this approach is an untenable situation where every decision by a joint venture to purchase goods risks being branded a group boycott and every sale a price-fixing conspiracy. *Compare* VII P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1477, 310 (2d ed. 2003). Imposing on parties the risk of crippling liability for doing no more than what has been approved by the regulators is not simply misguided, but dangerous to American competition policy, and ought to be examined by this Court.

For the reasons cogently explained by Judge Fernandez in dissent, no liability or even the *potential* for liability should attach here because "nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business also prices its own products."

Pet. App. 34a.[3] An integrated joint venture, like any business, must be able to do those things necessary to carry out its essential operations. In the case of a distribution and marketing firm, that obviously includes pricing the products it sells.

3. By denying the joint venture at issue the ability to price its goods for sale, the Ninth Circuit does more than interfere with its operation: it attacks its very existence. Characterizing the venture's setting of a price for the sale of its own gasoline as *per se* illegal is, in reality, questioning whether the joint venture should be permitted to engage in the marketing of gasoline in the first place. Such a question may be raised, *but not by means of a price-fixing claim alleging a horizontal conspiracy by the venture's members*. Rather, an attack on the creation or scope of a joint venture (were one to be brought), needs to proceed, if at all, under Section 7 of the Clayton Act, 15 U.S.C. § 18, subject to its requirements and burdens of proof, and taking into account the venture's purpose as well as its potential effects on competition. That is the framework under which the regulators reviewed the formation of the venture here and it is the way in which a case brought after the fact—either by the government or private plaintiffs—to challenge the permissible activities carried on by the venture needs to proceed.

In this case, the Federal Trade Commission ("FTC") and state Attorneys General resolved the issue of the joint venture's legality and scope when they approved the establishment and permissible functional operations of the venture in the first place. That decision purportedly is not challenged by the respondents. But once the matter of existence and

[3] *Amici* have filed this same brief in connection with the separately filed petitions of Texaco and Shell (Docket Nos. 04-805 and 04-814). For convenience, references are to the appendix filed with Shell's petition (04-814).

scope of operations is answered, there is no Section 1 question to be considered where the only issue is the right of the venture to set the prices for the things it has been allowed to make and sell. It is no more appropriate to ask whether Equilon should be allowed to decide what to charge for Texaco and Shell gasoline than to ask whether Sears can put a price tag on its dishwashers, or a law firm can decide what to charge for its attorneys' services.

4. The consequence of the Ninth Circuit's unaccountably misdirected decision is to undermine antitrust policy towards joint ventures. Foundational questions about whether the joint venture's activities would, on balance, result in a lessening of competition in this market were never addressed. Rather, respondents sought, and the majority applied, a completely inappropriate *per se* price-fixing analysis. The result is that such ventures are placed at a serious competitive disadvantage as a form of industrial organization. In light of the unique role which the judicial branch (and, perforce, this Court) plays in articulating American competition policy, the Court should grant these petitions to set antitrust analysis of joint ventures back on a sound footing—one which takes proper account of the procompetitive benefits that joint ventures can generate and properly balances benefits and harms by considering actual market effects.

REASONS FOR GRANTING THE WRIT

A. Joint Ventures Are Of Great Importance To American Commerce And Should Be Fostered Under The Antitrust Laws.

Joint ventures are ubiquitous and operate in virtually every sector of the economy. They are a vital part of our economic system and it is critically important to protect their utility as a form of industrial organization. As one commentator has observed, "[f]irms in nearly every American industry are now considering alliances, joint ventures, mergers, and other collaborative arrangements with their competitors. . . . Indeed, . . . such collaborations are becoming the dominant form of economic integration in the world economy." Thomas A. Piraino, Jr., *A Proposed Antitrust Approach To Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1139 (2001) (internal quotation omitted). *Amicus* Visa is itself, perhaps, the most well-known example of a successful joint venture, though a review of the business press reveals innumerable others formed on a daily basis. For example, in the last 30 days alone, new joint ventures have been announced by Honda and British American Tobacco; Cisco and EMC; IBM and China Great Wall Computer Group; Fairmont Hotels & Resorts, Kingdom Hotels International and Bank of Scotland; Bristol-Myers Squibb and Gilead Sciences; SBC Communications and 2Wire; and many others. It is difficult to quantify precisely the scope of this activity, but some estimates suggest that the number of joint ventures and strategic alliances are growing annually by 25 to 35 percent, with a current rate of formation of approximately 10,000 per year. *See* Peter Pekar, Jr. and Mark S. Margulis, *Equity Alliances Take Center Stage*, 14:2 Bus. Strategy Rev. 50, 55 (2003).

Joint ventures, which can generate "cost reductions [that] tend to yield higher output and lower prices . . . ," XI H. Hovenkamp, *Antitrust Law* ¶1907c, 221 (1998), have been recognized by this Court in leading cases such as *Copperweld Corp.*, 467 U.S. at 768 ("[M]ergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, formation of such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect."); and *NCAA*, 468 U.S. at 103 ("a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."). They also have been the subject of extensive scholarship. *See, e.g.*, Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 876 (1994) ("A joint venture may allow its partners to achieve economic efficiencies that they could not have accomplished on their own. In the long run, such efficiencies may outweigh any restriction of competition caused by a joint venture."); *see also* Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 702 (1998) ("Joint ventures are an important and distinct category for antitrust analysis because of their potential to bring about an efficiency-enhancing integration of economic activity."); and XIII H. Hovenkamp, *Antitrust Law* ¶2121b, 117 (1999).

The petitioners in this case believed that a joint venture—as opposed to some other form of business organization—was the most effective and efficient means for carrying out a combined business. "[A]ntitrust policy should not bias the selection of a form of business organization by entrepreneurs and investors." H. Chang, D. Evans and R. Schmalensee, *Some*

Economic Principles For Guiding Antitrust Policy Towards Joint Ventures, 1998 Colum. Bus. L. Rev. 223, 262 (1998). But that is precisely the consequence of the Ninth Circuit's decision. Despite possible increased transaction costs and decreased flexibility, parties might decide to forego their collaboration entirely or might choose to merge instead of forming a joint venture, simply to avoid the risk of liability resulting from an improvident analytic approach such as that offered by the Court of Appeals in this case. That is inefficient, and makes no sense. There is no reason to distinguish Equilon—an integrated joint venture carrying out all aspects of the downstream gasoline business in competition with other sellers—from other competitors based simply on its genesis. *See Chicago Prof. Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996); *Arizona v. Maricopa County Med. Society*, 457 U.S. 332, 356 (1982). But the Ninth Circuit has done just that, by creating a liability trap that is able to snap shut when the venture does no more than what it was formed to do.

Incorrect antitrust analysis, and the resulting uncertainty which it fosters, poses serious risks to vigorous competition. Particularly in the area of joint ventures, where the law has struggled to encourage efficient business organizations amidst its inherent distrust of horizontal arrangements among competitors, there is a compelling need for certain, predictable and efficient rules. Because the Ninth Circuit's decision imposes "the severe sting of antitrust liability," Pet. App. 34a (Fernandez J., dissenting), on legitimate joint ventures doing precisely what they were created to do, the risks to efficient competition by joint ventures will be realized if the Ninth Circuit's decision stands.

Even before the decision in this case, it had been observed that, because "courts and enforcement agencies

have been unable to agree upon a uniform method of balancing the procompetitive and anticompetitive aspects of particular collaborations[,] . . . American firms have been needlessly deterred from entering into cooperative arrangements that could enhance their efficiency." Piraino, 86 Iowa L. Rev. at 1141. Without intervention from this Court clarifying the circumstances under which firms are at risk in these cooperative ventures, it will be exceedingly difficult for responsible business counselors to advise prospective joint venturers regarding the legality of their proposed activities. The natural—but competitively unhappy—outcome will be to deter needlessly the formation of ventures which offer the potential for significant procompetitive benefits. Avoiding that untoward result is a worthwhile use of this Court's certiorari jurisdiction.

B. Certiorari Should Be Granted To Affirm That Section 1 Has No Application To A Fully Integrated Joint Venture Carrying On The Business For Which It Was Created.

Precisely because of their ubiquity and potential for producing significant consumer welfare benefits, it is critical that courts develop and employ appropriate rules for dealing with joint ventures. As then FTC Chairman Timothy Muris observed: "No analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals." *In re Polygram Holding, Inc.*, No. 9298, 2003 FTC LEXIS 120, at *12 (F.T.C. July 24, 2003). Yet, despite the acknowledged importance of this "exercise," the Ninth Circuit in this case simply treated the venture's ordinary business decisions as if they were the product of a naked restraint. In doing so, it circumscribed entirely the "acceptable cooperation between direct rivals" in a distribution

and marketing joint venture, thereby materially undermining this form of business organization. If this venture, which fully integrated all aspects of Texaco's and Shell's downstream operations, cannot price for sale its own products, what marketing venture could? And what does it mean to say that the petitioners in this case were entitled to engage in "marketing"?

The Ninth Circuit's decision in this case is demonstrably incorrect. But *amici* urge review for a more fundamental reason. Certiorari is required because the approach taken by the Ninth Circuit is not merely mistaken, but reflects a lack of appreciation of how to address joint venture issues—a fact which strongly suggests that the lower courts lack sufficient guidance from this Court in dealing with joint venture cases generally.

This is not a price-fixing case. It is a case about whether the marketing of petroleum products should be allowed to be part of the Equilon joint venture. To reduce costs and maximize efficiencies, Equilon was created by Shell and Texaco to carry out all aspects of their downstream gasoline business. Equilon (along with Motiva, which is no longer a part of this case, *see* Pet. App. 9a-11a) was formed from virtually all of the companies' downstream assets. Pet. App. 3a n.3. In contrast with more limited joint ventures set up, for example, only to conduct research, engage in marketing or produce goods, Equilon was formed to own and operate *all aspects of the business*, from the refineries to the stations to the gas pumps. As a result of the formation of their joint venture Texaco and Shell no longer compete in downstream operations in the United States. *Id.* at 4a.

Once formed, a fully integrated entity should be treated no differently than a single firm when carrying out the functions

contemplated (and approved) at its creation.[4] The joint venture here effectively is a complete merger of the companies' downstream operations, and should be treated as such, to wit: as a single firm, outside the ambit of Section 1. Indeed, as the FTC later explained in a case involving a subsequent merger by Texaco: "For antitrust purposes, the Commission evaluated the formation of the Alliance [Equilon and Motiva] as if it were a complete merger of the downstream operations of Texaco and Shell. . . . In all subsequent oil merger investigations undertaken by the Commission, we have considered Texaco and Shell to be a single entity when evaluating downstream market concentration." *In The Matter of Chevron Corporation, a corporation, and Texaco Inc., a corporation,* Docket No. C-4023 (January 2, 2002), Statement of Commissioners Anthony and Thompson. Moreover, the Department of Justice

[4] As this Court observed in *Maricopa County Med. Society*, 457 U.S. at 356, a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . [can be] regarded as a single firm competing with other sellers in the market." Other courts and commentators have expressed similar views. *See Chicago Prof. Sports Ltd. P'ship*, 95 F.3d at 600 (observing that the NBA may be "best understood as one firm when selling broadcast rights to a network in combination with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few market opportunities"); *see also City of Mt. Pleasant, Iowa v. Assoc. Elec. Coop.*, 838 F.2d 268, 276 (8th Cir. 1988) (holding that Section 1 does not apply to the pricing decisions of an electric cooperative because "the cooperative organization is a single enterprise pursing a common goal"); *see also* VII P. Areeda, *Antitrust Law* ¶ 1478c, 355 (1986) ("In general, once a venture is judged to have been lawful at its inception and currently, its decisions should be regarded as those of a single entity rather than the parents' daily conspiracy on every purchase-sale-hiring-licensing choice.") (Professor Hovenkamp employs a slightly different articulation of this principle in his reissue of the classic Areeda treatise. *See* VII P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1478c, 325 (2d ed. 2003).)

and the FTC cite in their joint *Antitrust Guidelines for Collaborations Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000), this very combination as an example of a fully integrated venture *not to be considered a joint venture at all*, but rather a merger subject to the Horizontal Merger Guidelines. *See Example 1.*[5]

Like a single entity, a joint venture engaged in the distribution and marketing of products must be free to do internally those things which are necessary to compete. "[A]ntitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers." *Chicago Prof. Sports Ltd. P'ship*, 95 F.3d at 598. That includes pricing its products. Such a joint venture, like any business, needs to set the prices of the things it sells. Doing so is not even remotely illegal *per se*. In this context, it is not even an appropriate subject of an antitrust inquiry at all. *See Copperweld Corp.*, 467 U.S. 752; *see also*, XI H. Hovenkamp, *Antitrust Law* ¶1906d, 214 (1998). ("[M]any forms of joint marketing require an agreement about the price to be charged."); *see also, id.*, ¶1908e at 237 ("[A]greements about price are often essential to the administration of certain joint ventures, particularly in distribution."). As Judge Fernandez put it in his dissent: "What could be more integral to the running of a business than setting a price for its goods and services?"[6] Pet.

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[5] Texaco and Shell continued to compete in the upstream business—oil and gas exploration—in the United States and in both upstream and downstream operations elsewhere in the world. Pet. App. 4a & n.1.

[6] In response to the dissent's sound conclusion that there is nothing radical about an entity pricing its own goods for sale, the Ninth Circuit majority suggests that Texaco and Shell may in fact have "agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance," and that that was not a decision made by a "single economic entity." Pet. App. 19a, n.11. Even if that were true,

App. 34a. (Fernandez J., dissenting). Moreover, since Texaco and Shell no longer compete in that business in the United States, who other than Equilon *could* price those products for sale? *Id.*

C. Certiorari Should Be Granted To Consider When Section One Applies To An After-The-Fact Attack On The Formation Or Permissible Scope Of A Joint Venture.

A distribution and marketing joint venture without the ability to price its own goods is a legal oxymoron. It cannot exist, or cannot compete. The respondents' challenge to Equilon's pricing of the gasoline it produces, transports and sells at its gas stations, therefore, is not simply a challenge to a policy decision of an integrated joint venture, it is an attack on one of the *raisons d'etre* of Equilon: to compete as a seller in the downstream gasoline business.

Before Equilon was formed, its proposed operations were subjected to a lengthy review by the FTC and various state Attorneys General. Among other factors, the FTC considered the parents' market shares; the concentration in the market (HHI); barriers to new entry; and other similar factors bearing on the likely effect on competition that might result from formation of the venture. The likelihood that the venture would achieve cost savings and other efficiencies that could benefit

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it would be irrelevant. Negotiating the terms of a joint venture is not price fixing, and it certainly cannot be condemned as *per se* illegal without any consideration of the proposed venture's likely benefits. *See, infra, United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964). In any event, the creation of a distribution and marketing joint venture by definition gives rise to an entity that must price for sale its own goods. This was a foundational aspect of the venture that obviously was before the FTC and state Attorneys General when they reviewed and ultimately approved the formation of Equilon.

consumers also would have been considered. Based on its review, the FTC (joined by certain state Attorneys General) identified a number of areas of competitive concern and then sought and obtained divestitures to remedy overlaps between Shell and Texaco in these markets. *See In The Matter of Shell Oil Company, et al.*, 125 F.T.C. 769, Consent Order (April 21, 1998); *see also* Pet. App. 3a.

The FTC's investigation focused on the actual market effects of the venture, not on the way in which it was going to price its gasoline. Nothing in its Complaint or in the Consent Order resolving the case suggests that the FTC was at all concerned that Equilon would be responsible for all downstream aspects of the sale of gasoline, including the pricing of its gasoline for sale. Presumably that is because the formation of the venture was viewed by the FTC not as an ongoing collaboration among competitors but as a merger of Texaco's and Shell's downstream operations. Single entities are not price fixing when they merely set a sales price for their own goods.

The points noted above are forcefully underscored by respondents' recently-filed Opposition to Petitions for a Writ of Certiorari ("Opposition"). In that Opposition, respondents offer a vociferous attack on the appropriateness of Texaco and Shell being allowed to include joint marketing within their venture. Thus, for example, respondents assert that the two firms were profitable on their own (p. 5), and that no "efficiencies" were created by allowing the venture to market its own production (p. 8). According to respondents, those facts demonstrate that it is *per se* price fixing for the joint venture to agree on the prices to be charged for the gasoline produced by the venture in the United States. *See* Opposition at p. 9.

But that is fundamental *non-sequitur*. Assuming, *arguendo*, that what respondents assert is true, those facts conceivably could

have been grounds for *excluding* the marketing function from the permitted scope of the venture at the time of its formation, or, under appropriate circumstance, for attacking the scope of the venture thereafter. But—and this is the vital point—it is utterly inappropriate to turn an attack upon the formation or scope of a venture into a Section 1 claim by saying that it was a mistake to allow marketing to be included within it.[7]

Yet that is precisely what the Court of Appeals' decision effectively does. Despite the FTC's decision to treat the joint venture as a single entity, the Ninth Circuit majority has now revisited that decision *sub silentio*.[8] Moreover, it has done so without a proper invitation and on an utterly inappropriate

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[7] In a mystifying section of their Opposition, respondents assert that the illicit character of petitioners' behavior is demonstrated by the supposed fact that the owners of the venture, as opposed to "the venture," itself, priced the gasoline which Equilon produced and sold. Opposition at pp. 10-11. But that claim betrays a fundamental misunderstanding of what it *means* to be a joint venture. Who, other than the owners, are in a position to make decisions for the venture? If marketing had been *excluded* from the scope of petitioners' venture, then it unquestionably would be inappropriate for Texaco and Shell to agree (or even confer) about the pricing of their *separate* products. However, the gasoline produced and sold *by the venture* (albeit under two separate licensed trademarks) needed to be priced *by the venture*. The identity of the individuals making that "venture" decision is utterly beside the point.

[8] Respondents' Opposition also repeatedly asserts that the petitions raise questions that were not even before the Court of Appeals. *See* Opposition at, *e.g.*, pp. 1 & 9. But, in fact, the distinction between the approach adopted by the majority and that urged by petitioners is unavoidably central to the proper disposition of this case. In addition, of course, the dissent could not be clearer in drawing a critical distinction between a purported *per se* price-fixing conspiracy and "an entity which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business also pric[ing] its own products." Pet. App. 34a.

basis. As we say: *The issue here is not price fixing*. It is the validity and permissible operational activities of the venture. If the respondents wanted to mount an after-the-fact attack on those issues they needed to do so directly and by appropriate means. Specifically, their claim should not be under Section 1 at all (and certainly not as a *per se* unlawful horizontal price-fixing agreement).[9] It should, instead, be a claim that the functional scope of the venture violates Section 7 of the Clayton Act (or, perhaps, Section 2 of the Sherman Act, 15 U.S.C. § 2).

That is a fundamental distinction and one which, *amici* submit, is exceedingly important to observe. Had *that* challenge been raised, the court not only would never have confronted a *per se* price-fixing claim, but it would have needed to carefully analyze the benefits and costs imposed by allowing Shell

---

[9] While *amici* submit that this case should have been disposed of under the principles discussed in text (and, of course, by Judge Fernandez in his dissent), there can be no doubt that, at a minimum, this case should have been decided under the rule of reason, not the *per se* rule. Given the draconian consequences of applying a *per se* test, that issue has been the subject of many of this Court's most important antitrust decisions. *See, e.g., Broadcast Music, Inc.*, 441 U.S. 1; *NCAA*, 468 U.S. 85; *California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756 (1999); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Even if an attack upon the operational scope of a venture were "fair game" under Section 1, the venturers surely were entitled to defend the efficiency of including the marketing function (and, of necessity, pricing of the products to be marketed) as an "ancillary restraint" reasonably necessary to make their venture more efficient. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). As petitioner Texaco explains, this error, itself, is ample grounds for granting review in light of the clear conflict between the decision in this case and other contrary circuit court cases resolved under the rule of reason. *See* Texaco's petition at pp. 7-13; *see also* Shell's petition at pp. 13-15.

and Texaco to include marketing as a part of their venture as well as various other issues that are presented when a court is asked, after the fact, to decree what amounts to partial divestiture of a previously consummated merger. *See* V P. Areeda and H. Hovenkamp, *Antitrust Law* ¶1205, 296 (2d ed. 2003). Moreover, the usual burdens would apply, and respondents would have had to prove competitive harm. Under the Ninth Circuit's approach, that burden was shifted to the petitioners, who purportedly were unable to "offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies." Pet. App. 23a.

Amici have a strong intuition about how such a claim would have been resolved, had it been made. (Indeed, the very fact that it was not made, and that respondents chose, instead, to rest their case solely on a misplaced *per se* price-fixing theory strongly suggests that respondents share that intuition.) But that is not the point. The point is that allowing what should be only a challenge to formation and scope issues to be analyzed as *per se* price fixing when a venture sets the price of its products is fundamentally misdirected as a matter of antitrust policy towards joint ventures. It is a mistake that, we respectfully submit, calls out for correction by this Court.

D. Certiorari Should Be Granted To Provide Business With Needed Guidance Regarding The Applicability Of Section 1 To Joint Ventures.

Because of the prevalence of joint ventures and the exceeding importance of "defining the bounds of acceptable cooperation between direct rivals," *see In re Polygram Holding, Inc.*, *supra*, the Court should take this opportunity to give lower courts guidance regarding the proper way to address and analyze joint venture issues. As counsel for the respec-

tive petitioners have aptly noted, there is a clear division of approaches among the lower courts, including the circumstances under which a venture should be regarded as a single entity within the meaning of Section 1 and *Copperweld*.[10] However, *amici* submit that, unlike the ordinary case in which lower courts have reached divergent conclusions with respect to a discrete issue of law, the conflicts in approach reflected in the present petitions demonstrate a far more important and fundamental conflict which is central to the viability of the joint venture as a co-equal form of industrial organization—a matter which, because of its implications for American commerce, speaks with unusual force in favor of review.

While this Court has dealt with discrete "joint venture" issues in a number of prior important cases, it has not directly addressed the appropriate structure for analyzing joint ventures as such. The closest that it came to doing so was its decision in *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, holding that joint ventures are subject to analysis under Section 7 of the Clayton Act. Additionally, in *Copperweld*, this Court acknowledged, in passing, that joint venture conduct frequently lies in something of an antitrust netherworld between single-firm activity and horizontal combination and that rule of reason analysis typically will apply for that reason. However, that unexplicated assertion—while itself entirely at odds with the approach taken by the Ninth Circuit in this case—plainly was not intended to be a definitive assessment of the single entity issue as applied to joint ventures (a matter which was not remotely presented in *Copperweld*). Rather, the Court's brief *dicta* in that case should be taken as an acknowledgement that there is a fundamental issue of characterization (and, hence, of potential antitrust liability *vel non*) in cases involving joint ventures which is every bit as

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[10] *See, e.g.*, Shell's petition at pp. 10-13.

important in commercial terms as the parent-subsidiary question decided in *Copperweld*. That issue—when Section 1 applies to a joint venture—remains, and plainly needs to be decided.[11]

There is a second sense in which this case fairly invites the attention of this Court. Perhaps uniquely, American antitrust law is a creature of judicial, as opposed to legislative, creation. Not only is the language of the Sherman and Clayton Acts exceedingly general in critical respects, those statutes—as this Court, on several occasions, has observed—cannot even mean what they say.[12] Thus, without careful judicial cabining they likely would be unconstitutionally void for vagueness. *But see Nash v. United States*, 229 U.S. 373, 376-78 (1913) (upholding criminal conviction under rule of reason). Yet they are the fundamental engines through which the largest economy in the world regulates competition. Moreover, unlike most other industrialized countries, much of that regulation comes through litigation, often instituted by private parties before courts which are presided over by judges with no special training in industrial organization economics. Given this unique situation, *amici* respectfully suggest that the usual presumptions against review—so necessary to manage a docket overflowing

[11] Prior to *Copperweld*, Chief Justice Rehnquist had dissented from denial of certiorari in a joint venture case involving the *National Football League* on the ground that the league should have been treated as a single entity *NFL v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of cert.) ("the league competes as a unit against other forms of entertainment").

[12] *See Nat'l Soc. of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says."); *see also Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531-32 (1983); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

with urgent requests for hearing—needs to be tempered by consideration of the unique judicial function in antitrust cases.

As noted previously, the Court has not spoken in definitive terms regarding the proper application of the Sherman Act to joint ventures, including specifically the circumstances under which some form of "single entity" principle applies, thereby foreclosing a Section 1 challenge altogether. In light of the unquestioned importance of joint ventures and the need for both legal counselors and courts confronting joint venture cases to be able to provide clear guidance and render consistent, predictable decisions, *amici* respectfully submit that review here would be appropriate.[13]

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be granted.

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[13] At a minimum, this Court should seek the views of the Solicitor General on whether to grant certiorari. This case is unlike the situation in cases like *3M Co. v. LePage's, Inc.*, 124 S.Ct. 2932 (2004) in which the Solicitor General, upon invitation, urged the Court to deny certiorari despite the government's acknowledgement of apparent error, so that the issue (there, "bundled pricing") could benefit from further judicial development in subsequent cases. Here, the issue is fully framed and the conflict in approach starkly presented by the majority and dissenting opinions, respectively.

MOTION FILED
JAN 13 2005

Nos. 04-805 and 04-814

IN THE

Supreme Court of the United States

TEXACO, INC.,
Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,
Respondents.

SHELL OIL COMPANY,
Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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January 13, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the

Petitioners. Petitioners have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court. Counsel for Respondents declined to give consent, thereby necessitating this motion.

WLF is a public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the antitrust laws. *See, e.g., Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States Tobacco Co. v. Conwood Co.*, *cert. denied*, 123 S. Ct. 876 (2003); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003).

WLF is concerned that the decision below, if not reviewed by this Court, would create excessive uncertainty in joint ventures by establishing *per se* antitrust liability for normal and legitimate business decisions. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

Respectfully submitted,

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January 13, 2005

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 1

I. This Case Presents A Sound Vehicle For Addressing The Application of Sherman Act § 1 to Joint Ventures 1

II. The Ruling Below, If Allowed To Stand, Would Open A Pandora's Box of Antitrust Liability for Joint Ventures 4

CONCLUSION 6

TABLE OF AUTHORITIES

Pages

STATUTES

Robinson-Patman Act,
15 U.S.C. § 13(a) 5
Sherman Act § 1,
15 U.S.C. § 1 ..... 1, 4, 5

OTHER AUTHORITIES

Zolman Cavitch, BUSINESS ORGANIZATIONS WITH TAX PLANNING (2004) 2, 3-4
U.S. Dept. of Justice, UNITED STATES ATTORNEYS' MANUAL: ANTITRUST RESOURCE MANUAL (1997) 5

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] The interests of the *amicus* are set out in the motion for leave to file accompanying this brief.

ARGUMENT

I. This Case Presents A Sound Vehicle For Addressing The Application of Sherman Act § 1 to Joint Ventures.

In their Opposition, Respondents argue that the facts of this case do not present the question advanced by the Petitioners – namely, whether it is *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, for a lawful, economically integrated joint venture to set the selling price of its own products. Opp. at 9-13. But this question is, in fact, squarely presented here. The factors cited by Respondents with regard to the joint ventures created by Shell and Texaco (*i.e.*, Equilon in the Western U.S. and Motiva in the Eastern U.S.) are simply attributes of joint ventures in general.

The Federal Trade Commission approved the formation of the two joint ventures. Pet. App. 3a. The courts below correctly determined, based on the undisputed evidence, that the entities are *bona fide* joint ventures. The district court observed:

> Several undisputed facts appear to foreclose the conclusion that Equilon and Motiva are nothing but window-dressing for an old-fashioned price fixing cartel or are otherwise patently anticompetitive. Though the parties dispute the exact extent of integration, both

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

> ventures control significant refining and marketing assets. Both entail risk sharing based on the Defendants' respective capital investments. Both have in fact achieved cost savings. . . .

Pet. App. 40a-41a.

The district court also cited undisputed evidence of the Defendants' expectation of benefits from greater economies of scale and from the sharing of best practices and technologies. Pet. App. 41a-42a.

The Court of Appeals itself acknowledged that the Defendants determined before creating the joint ventures that they would bring about extensive synergies and efficiencies with cost savings of up to $800 million annually. Pet. App. 3a.

Respondents' Opposition acknowledges that Texaco and Shell integrated their former gasoline marketing and refining operations into the joint ventures and that the parent companies no longer competed in the United States at the wholesale and retail level. Opp. at 5, 10.

Respondents nonetheless argue, as did the Court of Appeals, that the pricing here "was not a decision made by a single economic entity – it was a decision made by competitors." Opp. at 9. But the factors that Respondents rely on are commonplace characteristics of joint ventures; some are even inherent in the nature of a joint venture. One treatise defines a joint venture as follows:

> The elements of a joint venture consist of (i) a community of interest in the performance of the common purpose, (ii) joint control or right of control, (iii) a joint proprietary interest in the subject matter, (iv) a right to share in the profits, and (v) a duty to share in any losses which may be sustained.

Zolman Cavitch, 2-41 BUSINESS ORGANIZATIONS WITH TAX PLANNING § 41.05 (2004).

It is true, as Respondents state, that "Shell and Texaco did not vanish and become absorbed in their new ventures." Opp. at 10. But this is scarcely remarkable; a joint venture *by definition* involves "joint control or right of control" by two or more parent entities. The transaction that Respondents describe would not be a joint venture formation at all – it would be a merger.

Respondents further argue that the presence of decision-making by the joint ventures as distinct entities is defeated by the fact that Equilon and Motiva were governed under the joint venture agreements by "Brand Management Protocols" that determined how the joint ventures could use the Texaco and Shell brands, and by a "Brand Management Council" that oversaw compliance with the Protocols. Opp. at 10, 11. Here again, such protective contractual provisions and such retention of supervisory control are ordinary incidents of joint venture formation, an essential element of which is "joint control or right of control." The same is true of the management powers vested in the Members Committees. Opp. at 11.

Respondents also point to the fact that the joint venture agreements included provisions that allowed for dissolution of the joint ventures at any time by mutual consent or unilaterally upon two years' notice after the first five years. The dissolution provisions further allowed Shell and Texaco to return to the downstream markets upon the dissolution of the joint ventures. Opp. at 10. But a contractual provision allowing for dissolution of a joint venture is a garden-variety element of a joint venture agreement:

> The duration of a joint adventure may be fixed by the terms of a contract between the parties or by mutual consent. If no date is fixed by the contract for its termination, the agreement remains in force until its purpose is accomplished or until such accomplishment has become impracticable or the venture is dissolved by any of the co-venturers.

Zolman Cavitch, 2-41 BUSINESS ORGANIZATIONS WITH TAX PLANNING § 41.08 (2004).

Moreover, in the event that the joint ventures were to be dissolved, it would hardly be reasonable to require the venture partners to forswear returning to the markets they had previously been serving and in which they had heavily invested prior to the formation of the joint ventures.

The factors relied upon by Respondents simply indicate that Equilon and Motiva were indeed joint ventures. Thus, the question is properly presented: ~~When a~~ *bona fide* joint venture sells its own products and sets prices for those products, are its price-setting decisions to be treated as concerted action and *per se* illegal under Sherman Act § 1 simply because the joint venture is owned by companies that formerly competed in that market?

II. The Ruling Below, If Allowed To Stand, Would Open A Pandora's Box of Antitrust Liability For Joint Ventures.

By treating a *bona fide*, federally approved joint venture as, in essence, a cartel, the decision below creates the potential for antitrust liability – including criminal penalties – on the part of joint ventures and their executives in a variety of business contexts. Judge Fernandez noted in his dissenting opinion below,

> In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other business entity could. What could be more integral to the running of a business than setting a price for its goods and services?

Pet. App. 34a.

Section 1 of the Sherman Act has been interpreted to bar not only the joint setting of prices, but joint decision-making in the setting of *any* terms or conditions in the sale of a product – including financing, warranties, and the like. U.S. Dept. of Justice, 7 UNITED STATES ATTORNEYS' MANUAL: ANTITRUST RESOURCE MANUAL § 8 (1997). Thus, under the theory of Respondents and the Court of Appeals, a wide range of normal business decisions by a joint venture would be treated as unlawful collaborative action.

Where, as here, the claim is based on a joint venture having set the same prices for different product lines, the theory of Respondents and the Court of Appeals places the joint venture in a particularly difficult position. On one hand, Respondents see a *per se* violation of the Sherman Act based on the joint ventures having set the same prices for Shell and Texaco gasoline despite those labels having "different reputations and customer bases." Opp. at 19. Yet at the same time, the Robinson-Patman Act prohibits price discrimination among customers in the sale of products "of like grade and quality." 15 U.S.C. § 13(a). Respondents would thus have the joint ventures whipsawed between the requirements of the two statutes: barred from setting the *same* prices for two of its own product lines, yet barred from setting *different* prices for those products to the extent a court may deem them "of like grade and quality" even if not identical.

CONCLUSION

For the foregoing reasons and for the reasons stated by Petitioners, the Court should grant the petitions for certiorari.

Respectfully submitted,

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January 13, 2005

(29) (26)

Nos. 04-805 and 04-814

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petitions for Certiorari Filed December 14, 2004
Petitions for Certiorari Granted June 27, 2005

CONTENTS

Relevant District Court Docket Entries 1

Relevant Court of Appeals Docket Entries 7

Second Amended Complaint for Damages and Injunctive Relief Under the Antitrust Laws, No. CV-99-06114 GHK (C.D. Cal.) (filed January 24, 2000) 9

Answer of Shell Oil Co. to Second Amended Complaint, No. CV-99-06114 GHK (C.D. Cal.) (filed Feb. 8, 2000) 31

Answer of Texaco Inc. to Second Amended Complaint, No. CV-99-06114 GHK (C.D. Cal.) (filed Feb. 8, 2000) 43

Answer of Saudi Refining, Inc. to Second Amended Complaint, No. CV-99-06114 GHK (C.D. Cal.) (filed Feb. 8, 2000) 59

Joint Stipulation of Uncontroverted Facts and Conclusions of Law, No. CV-99-06114 GHK (C.D. Cal.) (filed Oct. 5, 2001) 71

ITEMS PRINTED IN APPENDICES TO PETITIONS

	04-805 Appx.	04-814 Appx.
Order of the U.S. Court of Appeals for the Ninth Circuit on Petitions for Rehearing and Rehearing En Banc (filed Sept. 15, 2004)	1a	75a
Opinions of the U.S. Court of Appeals for the Ninth Circuit (filed June 1, 2004)	2a	1a
Memorandum and Order of the District Court on Motions for Summary Judgment (Part I) (C.D. Cal.) (filed May 21, 2002)	34a	62a
Memorandum and Order of the District Court on Motions for Summary Judgment (Part II) (C.D. Cal.) (filed Aug. 13, 2002)	46a	36a

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Fouad N. Dagher, *et al.* v. Saudi Refining, Inc., *et al.*
No. CV-99-06114 GHK (JWJx)

RELEVANT DISTRICT COURT DOCKET ENTRIES

DATE	#	DESCRIPTION
6/15/99	1	COMPLAINT filed Summons(es) issued referred to Discovery Jeffrey W. Johnson; Jury demand
6/15/99	2	1st AMENDED COMPLAINT [1-1] by plfs; jury demand. Summons issd on 1st A/C
9/10/99	29	NOTICE OF JOINT MOTION by defendants Saudi Refining Inc, Texaco Inc, Shell Oil Company, and Equilon Ent LLC to dismiss 1st A/C. ; motion hearing set for 9:30 10/4/99
1/1/00	45	MEMORANDUM and ORDER by Judge George H. King that the follow 4 mot are rendered moot by the ptys stip; Equiva dfts mot to dism, dft Equilon's mot to dism, dft Motiva's mot to dism under 12(b)(6), dft MOtiva's mot to dism under 12(b)(2). Dfts jt mot to dism is DENIED insofar as pltfs sect 1 clm is based on allegations of fixing of gasoline prices. Dfts jt mot to dism is granted insofar as pltfs sect 1 clm is based on allegations of Division of mkt and customers; and manipulation of pltfs svc sta leases; Pltfs are hereby granted leavt ot

DATE	#	DESCRIPTION
		amend their FAC . Pla sahal fi the 1nd A?C within 10 days hereof. SHld pla fail to fi their 1AC timely, we will deem such fail to ba a wavier. In that event, dfts shall ans the FAC within 10 days thereafter; RE motion to dismiss 1st A/C. [29-1] moot., motion to dismiss Motiva Enterprises LLC for lack of jurisdiction [27-1] moot., motion to dismiss Equilon Enterprises LLC. [26-1] moot., motion to dismiss Motiva Enterprises LLC. [25-1] moot., finding the motion to dismiss dfts Equiva Trading Co and Equiva Services LLC. [24-1] moot.
1/25/00	49	SECOND AMENDED COMPLAINT [1-1] by plaintiff; adding Motiva Enterprises, Equilon Enterprises, Equiva Trading Co, Equiva Services LLC; jury demand. Summons not issued
1/28/00	51	AMENDED MEMORANDUM and ORDER by Judge George H. King this matter is before the Crt on the following five motions to dismiss (see doc for details). Pltfs are hereby gr leave to amend their FAC to clarify these allegations in accord with this Order. Pla shall fi their 2nd AC within 20 days hereof. Dfts shall ans the FAC as to the remaining allegations of price fixing within 10 days thereafter.
2/8/00	53	ANSWER filed by defendant Shell Oil Company to 2nd amended complaint [49-1]

DATE	#	DESCRIPTION
2/8/00	54	ANSWER filed by defendant Saudi Refining Inc to 2nd amended complaint [49-1]
2/8/00	55	ANSWER filed by defendant Texaco Inc to 2nd amended complaint [49-1]
11/30/00	78	NOTICE OF MOTION AND MOTION by plaintiff to compel return of Saudi documents ; motion hearing set for 2:00 12/14/00 Lodged ord **FI UNDER SEAL**
5/1/01	103	MINUTES: denying motion to compel return of Saudi documents [78-1]; cnsl for Saudi Refining Inc shall file decls re Mr Al-Bayat & Mr Al-Shaifanis respective involvement in the motive pre-formation process to be fld on or before 5/14/01 by Magistrate Judge Jeffrey W. Johnson
5/1/01	104	AMENDED MINUTES: denying motion to compel return of Saudi documents [78-1]; cnsl for Saudi Refining Inc shall file decls re Mr Al-Bayat & Mr Al-Shaifanis respective involvement in the motive pre-formation process on or bef 5/14/01 by Magistrate Judge Jeffrey W. Johnson
6/8/01	113	MINUTES: The Mag Judges 5/2/01 ruling as amd on 5/10/01 is AFFIRMED & plfs objs are OVERRULED by Judge George H. King

8/9/01	136	NOTICE OF MOTION AND MOTION by plaintiff, defendant to strike the decl of Richard A Broderick filed in support of dfts' mot for summ jgm motion hearing set for 9:30 9/10/01 Lodged order
9/13/01	144	MINUTES: denying motion to strike the decl of Richard A Broderick filed in support of dfts' mot for summ jgm [136-1], taking motion for summary judgment [115-1] off calendar by Judge George H. King
10/5/01	146	AMENDED NOTICE OF MOTION AND MOTION by defendant Shell Oil Company, Texaco Inc, Saudi Refining INc for summary judgment ; motion hearing set for 9:30 12/3/01
10/5/01	148	NOTICE RE: DOC W/HELD FROM CASE FILE: Document filed UNDER SEAL (jp) [Joint Stipulation of Parties with Respect to Issues to be Decided for Summary Judgment [Resubmitted Pursuant to 09/13/2001 Order]]
10/5/01	149	NOTICE RE: DOC W/HELD FROM CASE FILE: Document filed UNDER SEAL (jp) [Joint Stipulation of Uncontroverted Facts and Conclusions of Law, Including Proposed Orders [Resubmitted Pursuant to 09/13/2001 Order]]

5/21/02	153	MEMORANDUM & ORDER by Judge George H. King re Joint Briefing on Motions for Summ Jgm (part one re plfs' standing against SRI); SRI's Motion for Summ Jgm [146-1] on the issue of antitrust standing is GRANTED
8/13/02	155	MEMORANDUM & ORDER re cross-motions for summary jgm (part two: re Sec 1 per se & quick-look liability) by Judge George H. King; dfts mot is gr as plfs failed to raise a triable iss of fact as to per se or quick-look sec 1 liability; dfts purported Copperweld defense is denied as moot; plfs mot is den
8/13/02	156	JUDGMENT by Judge George H. King against plaintiffs; IT IS HEREBY ADJUDGED that dfts Shell, Texaco, & SRI shl have jgm agnst plfs & plfs shl recover nothing on their cmp terminating case
8/30/02	160	NOTICE OF APPEAL by plaintiffs Fouad N Dagher, Bisharat Ent Inc,Alfred Buczkowski,Esequiel Delgado,Nasser El-Radi,G.G. & R. Petroleum,Inc.,H.J.F. Inc.,Kaleco,Co.,Carlos Marquez,Sami Merhi,Edardo R. Parungao,Ron Abel Serv. Center,Inc.,Jerry'Shell Serv.Center,Inc.,Gullermo Ramirez,Leopolo Ramirez,Nozar Sheibaini,Sitara Management Corp.,Tinsal Ent.Inc.,Quang Troung,Steven Ray Vezerian,Los Feliz Shell,Inc., & Nassim Hanna to 9th C/A from Dist. Court jgm ent

8/14/02 [156-2],ord ent 8/14/02 [155-1],ord fld 5/21/02 [153-1] (cc: Bleau,Fox & Associates;Alioto Law; Gray,Plant,Mooty,Mooty & Bennett;John H. Boone;Howery & Simon;Howery & Simon;Munger,Tolles & Olson;White & Case; White & Case;Baker & Hostetler & Equiva Services) Fee: Paid.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Fouad N. Dagher, *et al.*, v. Saudi Refining, Inc., *et al.*
No. 02-56509

RELEVANT COURT OF APPEALS
DOCKET ENTRIES

DATE	DESCRIPTION
9/6/02	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellant's designation of RT is due 9/9/02,, ; appellee's designation of RT is due 9/19/02,, ; appellant shall order transcript by 9/30/02,, ; court reporter shall file transcript in DC by 10/30/02; certificate of record shall be filed by 11/6/02 ; appellant's opening brief is due 12/16/02,, ; appellees' brief is due 1/15/03,, ; appellants' reply brief is due 1/29/03
6/1/04	FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Stephen R. REINHARDT, author; Ferdinand F. FERNANDEZ, partial concurrence and partial dissent; Johnnie B. RAWLINSON.) FILED AND ENTERED JUDGMENT. (4.5(e) notice to author)

6/22/04	Filed original and 50 copies Appellees Texaco Inc. and Shell Oil Company's petition for rehearing and rehearing en banc, 19 p.pages; served on 6/22/04 (PANEL AND ALL ACTIVE JUDGES)
9/15/04	Filed order (Stephen R. REINHARDT, Ferdinand F. FERNANDEZ, Johnnie B. RAWLINSON): (SEE TEXT) The petitions for rehearing and rehearing en banc are denied.
9/17/04	Filed order (Stephen R. REINHARDT, Ferdinand F. FERNANDEZ, Johnnie B. RAWLINSON): Defendants-Appellees Texaco, Inc. and Shell Oil Company's motion for a stay of issuance of the mandate pending application for writ of certiorari is granted. Therefore, it is ordered that the mandate is stayed for ninety (90) days pending the Defendants-Aples filing of a petition for writ of certiorari in the Supreme Ct, If such a petition is filed, and if the writ of certiorari is granted by the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

[Filed January 24, 2000]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Case caption omitted in printing]

~~FIRST~~ SECOND[*] AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER THE ANTITRUST LAWS

I

INTRODUCTION

1. Plaintiffs bring this action on behalf of themselves and the approximately 23,000 Shell and Texaco branded dealers nationwide who operate or have operated Shell or Texaco branded marketing premises and franchises throughout the United States and who have purchased gasoline from Defendants MOTIVA ENTERPRISES LLC and/or EQUILON ENTERPRISES LLC, or both, since January 1998 to the present time.

2. Plaintiffs bring this action against defendants Saudi Refining, Inc., Texaco, Inc., Shell Oil Company, Equilon Enterprises LLC, Motive Enterprises LLC, Equiva Trading Company and Equiva Services LLC, for damages and injunctive relief caused by reason of defendants' violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Plaintiffs demand a trial by jury of all issues triable thereby, and for their complaint, allege as follows:

II

JURISDICTION

3. This Court has jurisdiction over plaintiffs' Sherman Act claims pursuant to Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §1337.

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[*] [Redlining throughout document appears in original.]

III

PLAINTIFFS

4. The above-named plaintiffs, individually and on behalf of a class of persons similarly situated, are the following individuals and entities, who operate or have operated the following Shell or Texaco branded marketing premises and franchises at the following locations:

Plaintiffs Name	Station Brand	Leased Marketing Premises Yes/No	Station Location
Fouad N. Dagher	Shell	Yes	Dagher Shell #2 916 Santa Anita Arcadia, CA 91006
Bisharat Enterprises, Inc.	Shell	Yes	Arcadia Shell Service 25 East Foothill Boulevard Arcadia, CA 91006
Tinsal Enterprises, Inc.	Shell	Yes	Victoria Shell 2440 South Victoria Ventura, CA 93003
Alfred Buczkowski	Shell	Yes	Oakview Shell 905 North Ventura Avenue Oakview, CA 93022
Los Feliz Shell, Inc.	Shell	Yes	Los Feliz Shell, Inc. 3053 Los Feliz Boulevard Los Angeles, CA 90039
Nassim Hanna	Shell	Yes	Hanna Shell 1410 South Soto Street Los Angeles, CA 90023
Fouad N. Dagher	Shell	Yes	Dagher Shell #7 1401 South Garfield Alhambra, CA 91803

Esequiel Delgado	Shell	Yes	Delgado Shell Service 4357 East Brooklyn Avenue Los Angeles, CA 90022
Nasser El-Radi	Shell	Yes	Delamo Shell 5910 Dell Lakewood, CA 90713
Carlos Marquez	Shell	Yes	Marquez Shell #12 2600 Pellissier Place Industry, CA 91746
Fouad N. Dagher	Shell	Yes	Dagher Shell #5 5533 East Washington Blvd. Commerce, CA 90040
Tinsal Enterprises, Inc.	Shell	Yes	N. Hill Shell 16961 Devonshire Street Granada Hills, CA 91344
Fouad N. Dagher	Shell	Yes	Dagher Shell #10 1900 East Ceasar Chavez Los Angeles, CA 90033
Mahwash Farzaneh	Shell	Yes	Lawndale Shell 15808 S. Inglewood Lawndale, CA 90260
Fouad N. Dagher	Shell	Yes	Dagher Shell #4 2219 Garfield Monterey Park, CA 91754
Nasser El-Radi	Shell	Yes	Shell 4U 430 Petrogrande Monterey Park, CA 91754
Carlos Marquez	Shell	Yes	Marquez Shell #7 3701 East Valley Boulevard West Covina, CA 91744

Nasser El-Radi	Shell	Yes	UR Shell 9305 East Firestone Downey, CA 90241
G.G.&R Petroleum, Inc.	Shell	Yes	Holiday Shell Service 800-M East Lugenia Avenue Redlands, CA 92374
H.J.F. Inc.	Shell	Yes	Simi Shell Food Mart 1120 East Los Angeles Avenue Simi Valley, CA 93065-2802
Kaleco, Co.	Shell	Yes	Camarillo Shell 1604 Ventura Boulevard Camarillo, CA 93010
Mike M. Madani	Texaco	No	South Bay Texaco 1700 Artesia Boulevard Redondo Beach, CA 90278
Quang Truong	Shell	Yes	Kathleen's Shell 4405 North Maine Avenue Baldwin Park, CA 91706
Fouad N. Dagher	Shell	Yes	Dagher Shell #13 8801 Lanewood Downey, CA 90240
Carlos Marquez	Shell	Yes	Marquez Shell #13 19910 Beach Boulevard La Mirada, CA 90638
Sami Merhi	Shell	Yes	Del Amo Shell 20225 South Avalon Carson, CA 90745

Steven Ray Vezerian	Shell	Yes	Steve's Shell Service 800 West Las Tunas Avenue San Gabriel, CA 91776
Guillermo Ramierez	Shell	Yes	West Covina Shell 801 South Glendora Avenue West Covina, CA 91790
Edgardo R. Parungao	Shell	Yes	Gardy's Shell Service 7511 East Rosecrans Avenue Paramount, CA 90723
Fouad N. Dagher	Shell	Yes	Dagher Shell #9 631 North Garfield Monterey Park, CA 91754
Sitara Management Corporation	Shell	Yes	Ventura/Shoup Shell 22330 Ventura Boulevard Woodland Hills, CA 91364
Paul E. Peterson	Shell	Yes	West Torrance Shell 20805 South Anza Avenue Torrance, CA 90503
Ron Abel Serv. Center, Inc.	Shell	Yes	Ron Abel's #2 21924 Devonshire Street Chatsworth, CA 90311
Jerry's Shell Serv. Center, Inc.	Shell	Yes	Jerry's Shell 5161 Van Nuys Boulevard Sherman Oaks, CA 91403
Guillermo Ramirez	Shell	Yes	Ramirez Shell Autocare 12004 East Ramona Boulevard El Monte, CA. 91732

Leopoloo Ramirez	Shell	Yes	Ramirez Shell 3660 North Puente Avenue Baldwin Park, CA 91706
Nazar Sheibaini	Texaco	Yes	Camarillo Texaco 256 Carmen Drive Camarillo, CA 93010

5. Each individually named plaintiff is a resident of the state of California and the Central District of California.

6. There are tens of thousands of individuals and/or entities, within the United States, too numerous to list every name in the case caption and, therefore, must be formed as a class in order to adequately litigate this action.

7. The representative Plaintiffs' claims are typical of the class generally. Plaintiffs, as named herein, share the exact same interests as the other members of the class and are able to fairly and adequately represent the interests of all members of the class.

8. The overall likelihood of individual Class Members prosecuting separate claims is remote at best. Individual members of the Class may or do not have a significant interest in individually controlling the prosecution of separate actions and the impact of such a scenario upon the judicial system would be a tremendous waste of judicial resources and may cause a crippling effect. Additionally, the prosecution of separate actions by individual Class Members would create a risk of inconsistent and varying adjudications concerning the subject of this action, which adjudications could establish incompatible standards of conduct for defendants under the laws alleged herein.

9. There is a well-defined community of interest in the questions of law and fact among the Plaintiffs, as named herein, and the Class Members. Questions of law and fact common to the members of the aforesaid Class predominate

over any questions which may affect only individual members, in that defendants have acted in a manner generally applicable to the entire Class.

10. Each corporate plaintiff is organized, exists, and doing business under the laws of the state of California, with its principal place of business located in the Central District of California.

11. Each plaintiff who currently operates Shell branded marketing premises, at all times relevant herein, has been in a franchise relationship with Shell Oil Co. or its assignee Equilon Enterprises LLC, and since approximately January 1998 has purchased wholesale Shell branded gasoline from Equilon for resale to the general public.

12. Each plaintiff who currently operates Texaco branded marketing premises, at all times relevant herein, has been in a franchise relationship with Texaco, Inc. or its assignee Equilon Enterprises LLC, and since approximately January 1998 has purchased wholesale Texaco branded gasoline from Equilon for resale to the general public.

IV

DEFENDANTS

Saudi Refining, Inc.

13. Defendant SAUDI REFINING, INC. ("Saudi") is a limited liability corporation with its headquarters and principal place of business in Houston, Texas. It is a corporate affiliate of Saudi Aramco, the state-owned oil company of the Kingdom of Saudi Arabia, the principal member of OPEC, the international oil cartel.

14. Saudi is, and at all times relevant herein, has been directly or indirectly engaged in the business of exploring for and producing crude oil, transporting crude oil, and refining, transporting, storing, and marketing petroleum products, including gasoline, in the United States.

15. Saudi, as part of Saudi Aramco, is one of the world's leading oil and natural gas producers, with substantial manufacturing, transportation and marketing functions.

16. The Chairman of Saudi met with the Chairmen of Shell and Texaco for the purpose of forming and organizing a combination with Shell and Texaco in the refining and marketing of gasoline.

17. The Chairman of Saudi knew and understood that the effect of the agreement with Shell and Texaco would be the elimination of competition between and among Saudi, Texaco and Shell in the refining and marketing of gasoline in the United States.

18. The Chairman of Saudi knew and understood that the agreement with Shell and Texaco was an agreement among competitors to fix the price of gasoline sold to the independent Texaco and Shell retail dealers.

19. The Chairman of Saudi knew and understood that the agreement with Shell and Texaco was an agreement among competitors to divide markets in the United States.

20. The Chairman of Saudi knew and understood that the agreement with Shell and Texaco was an agreement among competitors to divide customers in the United States.

21. Saudi in fact combined with Shell and Texaco to fix the price of gasoline sold to the independent Shell and Texaco retail dealers in the United States.

22. Saudi in fact combined with Shell and Texaco to divide markets in the United States.

23. Saudi in fact combined with Shell and Texaco to divide customers in the United States.

Shell Oil Co.

24. Defendant SHELL OIL COMPANY ("Shell") is a corporation organized, existing, and doing business under the laws of the state of Delaware, with its headquarters and principal place of business at One Shell Plaza, Houston,

Texas. Shell is a subsidiary of the Royal Dutch/Shell Group which is composed of Royal Dutch Petroleum Company (domiciled in the Netherlands) and The "Shell" Transport and Trading Company (domiciled in the United Kingdom).

25. Shell is, and at all times relevant herein, has been engaged in the business of exploring for and producing crude oil, transporting crude oil, and refining, transporting, storing, and marketing petroleum products, including gasoline, in the state of California and throughout the United States.

26. Shell, as part of Royal Dutch/Shell Group, is one of the world's leading oil and natural gas producers, with substantial manufacturing, transportation and marketing functions.

27. The Chairman of Shell met with the Chairmen of Saudi and Texaco for the purpose of forming and organizing a combination with Saudi and Texaco in the refining and marketing of gasoline.

28. The Chairman of Shell knew and understood that the effect of the agreement with Saudi and Texaco would be the elimination of competition between and among Saudi, Texaco and Shell in the refining and marketing of gasoline in the United States.

29. The Chairmen of Shell knew and understood that the agreement with Saudi and Texaco was an agreement among competitors to fix the price of gasoline sold to the independent Texaco and Shell retail dealers.

30. The Chairman of Shell knew and understood that the agreement with Saudi and Texaco was an agreement among competitors to divide markets in the United States.

31. The Chairman of Shell knew and understood that the agreement with Saudi and Texaco was an agreement among competitors to divide customers in the United States.

32. Shell in fact combined with Saudi and Texaco to fix the price of gasoline sold to the independent Shell and Texaco retail dealers in the United States.

33. Shell in fact combined with Saudi and Texaco to divide markets in the United States.

34. Shell in fact combined with Saudi and Texaco to divide customers in the United States.

Texaco, Inc.

35. Defendant, TEXACO, INC. ("Texaco") is a corporation organized, existing, and doing business under the laws of the state of Delaware, with its headquarters and principal place of business at 2000 Westchester Avenue, White Plains, New York.

36. Texaco is, and at all times relevant herein, has been engaged in the business of exploring for and producing crude oil, transporting crude oil, and refining, transporting, storing, and marketing petroleum products, including gasoline, in the State of California and throughout the United States.

37. Texaco is one of the world's leading oil and natural gas producers, with substantial manufacturing, transportation and marketing functions.

38. The Chairman of Texaco met with the Chairmen of Saudi and Shell for the purpose of forming and organizing a combination with Saudi and ~~Texaco~~ Shell in the refining and marketing of gasoline.

39. The Chairman of Texaco knew and understood that the effect of the agreement with Saudi and Shell would be the elimination of competition between and among Saudi, Texaco and Shell in the refining and marketing of gasoline in the United States.

40. The Chairmen of Texaco knew and understood that the agreement with Saudi and Shell was an agreement among competitors to fix the price of gasoline sold to the independent Texaco and Shell retail dealers.

41. The Chairman of Texaco knew and understood that the agreement with Saudi and Shell was an agreement among competitors to divide markets in the United States.

42. The Chairman of Texaco knew and understood that the agreement with Saudi and Shell was an agreement among competitors to divide customers in the United States.

43. Texaco in fact combined with Saudi and Shell to fix the price of gasoline sold to the independent Shell and Texaco retail dealers in the United States.

44. Texaco in fact combined with Saudi and Shell to divide markets in the United States.

45. Texaco in fact combined with Saudi and Shell to divide customers in the United States.

Equilon Enterprises LLC

46. Defendant EQUILON ENTERPRISES LLC ("Equilon") is a limited liability corporation with its headquarters and principal place of business in Houston, Texas.

47. Equilon is a combination between Texaco and Shell that combines their western and mid-western refining, transportation, terminal (storage), and marketing operations and assets. Shell owns 56 percent of Equilon, and Texaco owns the other 44 percent.

48. Equilon began operating during January 1998. Since that time, it has been in the business of refining, transporting, storing, and marketing petroleum products, including gasoline, in the state of California and other western and mid-western states.

49. Equilon refines and markets gasoline and other petroleum products under both the Shell and Texaco brand names in all or parts of 32 states, selling products to 9,002 Shell and Texaco retail outlets.

50. Equilon is the fourth largest retail gasoline marketer and the fourth largest refiner in the United States.

51. Equilon's annual gross revenue is approximately $22 billion.

52. Equilon is number one in market share in Oregon, Arizona, Nebraska, Oklahoma, Missouri, Arkansas and Kentucky. Equilon is number two in market share in Alaska, Hawaii, California, Nevada, Idaho, Wyoming, Colorado, New Mexico, Indiana and Illinois.

53. Equilon has seven refineries, refining approximately 846,000 barrels per day. Equilon owns 76 terminals for crude oil and refined products in the United States.

54. Equilon owns an interest, with its competitors, in 45,600 miles of pipeline throughout the United States.

55. Equilon is a combination, in the form of a trust or otherwise, used by Shell and Texaco to fix the price of gasoline sole to the independent Shell and Texaco retail dealers in the western and midwestern states of the United States.

Motiva Enterprises LLC

56. Defendant MOTIVA ENTERPRISES LLC ("Motiva") is a limited liability corporation with its headquarters and principal place of business in Houston, Texas.

57. Motiva is a combination between Texaco, Saudi, and Shell that combines their eastern United States and Gulf Coast refining, transportation, terminal (storage), and marketing operations and assets. Shell owns 35 percent of Motiva, and Texaco and Saudi each own 32.5 percent.

58. Motiva began operations during July 1998. Since that time, Motiva has been in the business of refining, transporting, storing, and marketing petroleum products, including gasoline, in the Gulf Coast and eastern United States.

59. Motiva refines and markets gasoline under the Shell and Texaco brand names in 27 states of the United States, selling products to 13,900 Shell and Texaco retail outlets.

60. Motive is the second largest retail gasoline marketer and the eighth largest refiner in the United States.

61. Motiva's annual gross revenue is approximately $11 billion.

62. Motiva is number one in market share in Texas, Louisiana, Alabama, Mississippi, Tennessee, Florida, North Carolina, Rhode Island, New Jersey, Maryland and Delaware.

63. Motiva is number two in market share in Georgia, Virginia, Pennsylvania, New Hampshire, Vermont, Massachusetts and Connecticut.

64. Motiva has four refineries, refining approximately 819,000 barrels per day. Motiva has 50 terminals for crude oil and refined products in the United States.

65. Motiva is a combination, in the form of a trust or otherwise, used by Saudi, Texaco and Shell to fix the price of gasoline sold to the independent Shell and Texaco retail dealers in the eastern and Gulf coast states of the United States.

Equiva Trading Co.

66. Defendant EQUIVA TRADING COMPANY ("Equiva Trading") is a general partnership headquartered in Houston, Texas, with offices in Universal City and Burbank, California; and Calgary, Canada.

67. Equilon and Motiva are the general partners in Equiva Trading, each having a 50 percent interest. Equiva Trading became operational in July 1998 and provides supply and trading services to Equilon, Motiva and affiliates of Texaco and Shell.

68. Equiva Trading was formed with the purpose and effect of eliminating competition in the supply and trading services to the Equilon and Motiva combines, and to the affiliates of Saudi, Texaco and Shell.

Equiva Services LLC

69. Defendant EQUIVA SERVICES LLC ("Equiva Services") is a limited liability corporation with its

headquarters and principal place of business in Houston, Texas.

70. Equiva Services is 50 percent owned by Equilon and 50 percent owned by Motiva. It began operations in July 1998, and provides economic and business research, facilities management, financial, human resources, information technology, legal, marketing, and safety, health and environmental services for Equilon and Motiva.

71. Equiva Services was formed with the purpose and effect of eliminating competition in services provided to the Equilon and Motiva combines, and to the affiliates of Saudi, Texaco and Shell.

V

CO-CONSPIRATORS

72. Plaintiffs are informed and believe that persons whose identities are at this time unknown have engaged with defendants in the violations alleged herein. Plaintiffs may at a later time amend this complaint to add said unknown co-conspirators as defendants when and if they become known.

VI

THE SHELL/TEXACO/SAUDI COMBINATIONS

73. In or about October 1996, at a place and time unknown to plaintiffs. Saudi, Shell and Texaco met and entered into an agreement to raise, fix, peg, and stabilize prices.

74. In or about October 1996, Saudi, Shell and Texaco formed their combinations, combining their refining, transportation, terminal (storage), and marketing operations and assets in the United States.

75. On or about March 1997, Shell and Texaco entered into a Memorandum of Understanding regarding the formation of a combination to be known as "Westco," which later was renamed "Equilon." Westco was to be organized as a limited liability corporation into which Texaco and Shell

would contribute their refining, transportation, terminal (storage), and marketing operations and assets in the western and mid-western United States (roughly corresponding with Petroleum Administration for Defense Districts ("PADDs") II, IV, and V).

76. On or about July 16, 1997, Shell, Texaco, and Saudi entered into a Memorandum of Understanding regarding the formation of a combination to be called "Eastco," which later was renamed "Motiva" Eastco was to be organized as a limited liability corporation into which Saudi, Shell, and Texaco would contribute their refining, transportation, terminal (storage), and marketing operations and assets in the Gulf Coast and eastern United States (roughly corresponding to PADDs I and III).

77. At some point during or after January 1998, Texaco and Shell sold, transferred or assigned to Equilon (formerly Westco) their interests in the marketing premises leased to plaintiffs, as well as their interests in and obligations under each plaintiff's franchise agreements.

78. With regard to those plaintiffs that operate leased marketing premises, prior to and after transferring those premises to Equilon, neither Shell nor Texaco made bona fide offers to sell, transfer, or assign their interests in the premises to plaintiffs.

79. Equilon was formed for the purpose and with the effect of eliminating competition between and among Saudi, Texaco and Shell in the refining and marketing of gasoline in the United States.

80. One of the purposes of Shell and Texaco in forming Equilon was to fix prices between themselves on gasoline sold to the independent Shell and Texaco branded dealers.

81. Shell and Texaco agreed that Equilon would fix the price at which gasoline is sold to the independent Shell and Texaco branded dealers in the western and mid-western states of the United States.

82. Equilon fixes the price at which gasoline is sold to the independent Shell and Texaco branded dealers in the western and mid-western states of the United States.

83. Motiva was formed for the purpose and with the effect of eliminating competition between and among Saudi, Texaco and Shell in the refining and marketing of gasoline in the United States.

84. One of the purposes of Saudi, Shell and Texaco in forming Motiva was to fix prices between and among themselves on gasoline sold to the independent Shell and Texaco branded dealers.

85. Saudi, Shell and Texaco agreed that Motiva would fix the price at which gasoline is sold to the independent Shell and Texaco branded dealers in the Gulf and east coast states of the United States.

86. Motiva fixes the price at which gasoline is sold to the independent Shell and Texaco branded dealers in the Gulf and east coast states of the United States.

VII

TRADE AND COMMERCE

87. The exploration, production, transportation, storage, refining, distribution, marketing, and selling of crude oil and gasoline is carried on in and substantially affects interstate and foreign commerce, and that the combination and conspiracy among and between Saudi, Texaco, and Shell, to fix the price of gasoline sold to retail dealers substantially affects, impedes, and unreasonably restrains the free flow of crude oil and gasoline between and among the various states of the United States, and foreign countries and the United States.

88. Entry into the refining and marketing of gasoline is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in those markets.

89. By reason of the violations alleged herein, plaintiffs have paid and continue to pay higher wholesale prices for

branded gasoline than they would in a free and competitive market.

90. Since the launch of the Equilon combination, wholesale and retail prices of gasoline sold in the slate of California have increased substantially.

91. During that same period, total statewide refinery production and inventories of gasoline rose compared to the same period in the previous year, refinery margins increased, and crude oil prices decreased.

92. Beginning at least during the last two years, crude oil prices, when adjusted for inflation, dropped to their lowest levels since the Great Depression of the 1930's.

93. During the time that crude oil prices were dropping to their lowest levels since the Great Depression, Saudi, Shell and Texaco, by and through Equilon and Motiva, agreed to and did in fact fix and raise the price of gasoline sold to the independent Shell and Texaco branded retail dealers.

94. Before Equilon and Motiva were formed, Saudi, Texaco and Shell were actual competitors.

95. Saudi, Shell and Texaco combined and conspired to form Motiva and Equilon as the means to fix prices on gasoline sold to the independent Shell and Texaco retail dealers.

96. Saudi, Shell and Texaco combined and conspired to form Motiva and Equilon as the means to divide markets and customers.

97. Saudi, Shell and Texaco did what they combined and conspired to do.

98. Motiva and Equilon combined, conspired and contracted to fix the price of gasoline sold to the independent Texaco and Shell dealers in the United States.

99. Motiva and Equilon combined, conspired and contracted to divide the markets in the United States.

100. Motiva and Equilon combined, conspired and contracted to divide customers in the United States.

101. Motiva and Equilon, as a combination, do the following:

(a) Market gasoline in all 50 states of the United States under both the Shell and Texaco brand names;

(b) Rank number one in national market share for branded gasoline, refining capacity and lubricant sales;

(c) Have annual gross revenue of approximately $33 billion;

(d) Provide product to 22,903 Texaco and Shell branded retail outlets;

(e) Own 11 refineries with a total refining capacity of 1,665,270 barrels per day;

(f) Own or have an interest in 126 crude oil and product terminals; and

(g) Have ownership interests with their competitors in 45,600 miles of pipeline.

102. By reason of the combination and conspiracy among Saudi, Texaco and Shell to fix prices by and through their combination, Equilon and Motiva, independent Shell and Texaco branded retailers paid more for their gasoline than they would have in a free and competitive market.

~~103. After acquiring plaintiffs' marketing premises and franchise agreements from Shell and Texaco, Equilon also imposed substantial rent increases upon each plaintiff operating leased marketing premises.~~

103. After acquiring plaintiffs' marketing premises and franchise agreements from Shell and Texaco, Equilon also imposed substantial rent increases upon each plaintiff operating leased marketing premises. In particular, prior to forming Equilon, both Shell and Texaco offered variable rent

programs, pursuant to which a dealer selling a specified amount of gasoline received a per gallon rebate or credit against station rent, and thereby a reduction in gasoline prices. After forming Equilon, acting in concert through Equilon, Shell and Texaco effectively eliminated their variable rent programs, so as to increase the price of gasoline to Shell and Texaco dealers. The foregoing conduct of defendants was an effort to coerce Shell and Texaco dealers to agree to raise the retail price of gasoline, and was part and in furtherance of defendants' agreement, combination, and conspiracy to fix, raise, stabilize, and peg the price of gasoline sold to Shell and Texaco dealers.

104. Furthermore, each plaintiff operating leased marketing premises has been deprived of an opportunity to acquire such premises. Franchisee ownership of marketing premises, as opposed to leasing such premises from a franchisor, substantially increases the value of a gasoline station business because it gives the owner-franchisee the freedom to negotiate arms length franchise agreements or supply contracts with any oil company franchisor on much better terms for the franchisee.

105. By reason of the violations alleged herein, plaintiffs and all persons similarly situated have sustained injury to their businesses and property in amounts yet to be ascertained, but including the loss of sales, profits, and business goodwill, increased rent, increased prices paid to defendants for gasoline and other petroleum products, the value of their businesses as going concerns, the increased costs of doing business, including any debts incurred.

106. Prior to the Equilon and other combinations outline above, Shell and Texaco were actual competitors.

VIII

SECTION 1 OF THE SHERMAN ACT

107. Each of the Equilon and Motiva combinations described hereinabove constitutes a contract, combination or conspiracy by Saudi, Shell and Texaco to raise, fix, peg, or

stabilize prices in *per se* violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. Section 1.

108. The Equilon and Motiva combinations constitute contracts, combinations or conspiracies between and among defendants, Saudi, Texaco, Shell, Equilon, Motiva, Equiva Trading and Equiva Services, to raise, fix, peg, or stabilize prices in per se violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. Sec. 1.

109. Each Chairman of Saudi, Texaco and Shell know of and approved of the price fixing agreement.

110. The Equilon and Motiva combinations constitute contracts, combinations or conspiracies between and among defendants, Saudi, Texaco, Shell, Equilon, Motiva, Equiva Trading and Equiva Services, to divide markets in per se violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. Section 1:

111. Each Chairman of Saudi, Texaco and Shell know of and approved of the agreement to divide markets.

112. The Equilon and Motiva combinations constitute contracts, combinations or conspiracies between and among defendants, Saudi, Texaco, Shell, Equilon, Motiva, Equiva Trading and Equiva Services, to divide customers in per se violation of Section 1 of the Sherman Antirust Act, 15 U.S.C. Section 1.

113. Each Chairman of Saudi, Texaco and Shell knew of and approved of the agreement to divide customers.

114. The overall conduct of defendants described above also constitutes a contract, combination or conspiracy to raise, fix, peg, or stabilize prices in *per se* violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. Sect. 1.

IX

PRAYER FOR RELIEF

WHEREFORE, plaintiffs, on behalf of themselves and all persons similarly situated pray for relief as follows:

(a) that the court adjudge and decree the instant action as a Class Action;

(b) that the jury find and this Court adjudge and decree that defendants have violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. Sec. 1:

(c) that plaintiffs and Class Members recover actual damages as the jury shall find them to have sustained and that the damages be trebled pursuant to Section 4 of the Clayton Act;

(d) that the Court issue a permanent injunction dissolving Equilon, Motiva, Equiva Trading, and Equiva Services pursuant to Section 16 of the Clayton Act;

(e) that the Court issue a permanent injunction enjoining and prohibiting defendants from contracting, combining, and conspiring to raise, fix, peg, or stabilize prices;

(f) that the Court issue a permanent injunction enjoining and prohibiting defendants from contracting, combining, and conspiring to fix plaintiffs' rents at artificially high and noncompetitive levels;

(g) that the Court issue a permanent injunction requiring defendants to allow any dealer to rebrand, without any penalty;

(h) for a complete list of the names, addresses, and telephone numbers of the persons and/or entities who were and/or are a Shell and/or Texaco branded dealer nationwide who operate or have operated Shell or Texaco branded marketing premises and franchises throughout the United States and of those persons or entities who has purchased gasoline from Defendants MOTIVA ENTERPRISES LLC and/or EQUILON

ENTERPRISES LLC, or both since January 1998 to the present time.

(i) that the Court award plaintiffs their costs of suit herein, including reasonable attorneys' fees pursuant to Section 4 of the Clayton Act; and

(j) that the Court award plaintiffs and Class Members such other and further relief as it shall deem just and appropriate.

Dated: January 24, 2000

ALIOTO LAW FIRM
SHULMAN, WALCOTT & SHULMAN, P.A. LAW OFFICE OF JOHN H. BOONE BLEAU, FOX & ASSOCIATES, A.P.C.

By: /s/
Joseph M. Alioto, Esq.

DEMAND FOR JURY

NOTICE IS HEREBY GIVEN that the plaintiffs in the above-entitled ~~First~~ Second Amended action demand a trial by jury in the above-entitled action.

Dated: January 24, 2000

ALIOTO LAW FIRM
SHULMAN, WALCOTT & SHULMAN, P.A. LAW OFFICE OF JOHN H. BOONE BLEAU, FOX & ASSOCIATES, A.P.C.

By: /s/
Joseph M. Alioto, Esq.

[Proof of service omitted in printing]

[Filed Feb. 8, 2000]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Case caption omitted in printing]

ANSWER OF SHELL OIL COMPANY TO SECOND AMENDED COMPLAINT

Defendant SHELL OIL COMPANY ("Shell"), for itself alone, answers plaintiffs' "Second Amended Complaint for Damages and Injunctive Relief under the Antitrust Laws" (the "Complaint") as follows:

1. Shell admits that plaintiffs purport to bring this action on behalf of themselves and other entities and persons described in Paragraph 1. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 1.

2. Shell admits that plaintiffs purport to bring this action against the defendants named in Paragraph 2 and to demand a jury trial. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 2.

3. Shell admits that the United States District Courts have subject matter jurisdiction over actions brought under the Sherman Act. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 3.

4. Shell lacks sufficient information to admit or deny the allegations of Paragraph 4 and on that basis denies such allegations.

5. Shell lacks sufficient information to admit or deny the allegations of Paragraph 5 and on that basis denies such allegations.

6. Shell denies the allegations of Paragraph 6.

7. Shell denies the allegations of Paragraph 7.

8. Shell denies the allegations of Paragraph 8.

9. Shell denies the allegations of Paragraph 9.

10. Shell lacks sufficient information to admit or deny the allegations of Paragraph 10 and on that basis denies such allegations.

11. Shell lacks sufficient information to admit or deny the allegations of Paragraph 11 and on that basis denies such allegations.

12. Shell lacks sufficient information to admit or deny the allegations of Paragraph 12 and on that basis denies such allegations.

13. Shell lacks sufficient information to admit or deny the allegations of Paragraph 13 and on that basis denies such allegations.

14. Shell lacks sufficient information to admit or deny the allegations of Paragraph 14 and on that basis denies such allegations.

15. Shell lacks sufficient information to admit or deny the allegations of Paragraph 15 and on that basis denies such allegations.

16. Shell denies the allegations of Paragraph 16.

17. Shell lacks sufficient information to admit or deny the allegations of Paragraph 17 concerning any knowledge or understanding of the Chairman of Saudi and on that basis denies such allegations. Shell admits that Saudi, Texaco and Shell have formed a legitimate joint venture, reviewed by relevant government authorities, that engages in refining and marketing of gasoline and other petroleum products in portions of the United States. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 17.

18. Shell denies the allegations of Paragraph 18.

19. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 19. To the extent a

further response is deemed to be required, Shell denies the allegations of Paragraph 19.

20. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 20. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 20.

21. Shell denies the allegations of Paragraph 21.

22. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 22. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 22.

23. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 23. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 23.

24. Shell admits the allegations of Paragraph 24.

25. Shell admits that during certain time periods it and/or its subsidiaries and affiliates have engaged in the business of exploring for and producing crude oil, and have refined, marketed, transported, and stored crude oil and petroleum products, including gasoline, in certain states. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 25.

26. Shell admits that it and/or its subsidiaries and affiliates produce oil and natural gas and engage in manufacturing, transportation and marketing. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 26.

27. Shell denies the allegations of Paragraph 27.

28. Shell admits that Saudi, Texaco and Shell have formed a legitimate joint venture, reviewed by relevant government authorities, that engages in refining and marketing of gasoline and other petroleum products in portions of the United States. Except as expressly admitted or denied for

lack of sufficient information herein, Shell denies the allegations of Paragraph 28.

29. Shell denies the allegations of Paragraph 29.

30. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 30. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 30.

31. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 31. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 31.

32. Shell denies the allegations of Paragraph 32.

33. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 33. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 33.

34. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 34. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 34.

35. Shell admits the allegations of Paragraph 35.

36. Shell lacks sufficient information to admit or deny the allegations of Paragraph 36 and on that basis denies such allegations.

37. Shell lacks sufficient information to admit or deny the allegations of Paragraph 37 and on that basis denies such allegations.

38. Shell denies the allegations of Paragraph 38.

39. Shell lacks sufficient information to admit or deny the allegations of Paragraph 39 concerning any knowledge or understanding of the Chairman of Texaco and on that basis denies such allegations. Shell admits that Saudi, Texaco and Shell have formed a legitimate joint venture, reviewed by relevant government authorities, that engages in refining and

marketing of gasoline and other petroleum products in portions of the United States. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 39.

40. Shell denies the allegations of Paragraph 40.

41. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 41. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 41.

42. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 42. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 42.

43. Shell denies the allegations of Paragraph 43.

44. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 44. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 44.

45. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 45. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 45.

46. Shell admits the allegations of Paragraph 46.

47. Shell admits that Equilon is a joint venture formed by Texaco and Shell that refines and markets petroleum products in certain western and midwestern states, and that Shell and Texaco have 56 percent and 44 percent interests, respectively, in Equilon. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 47.

48. Shell admits the allegations of Paragraph 48.

49. Shell lacks sufficient information or belief to admit or deny the allegations of Paragraph 49, and on that basis denies such allegations.

50. Shell lacks sufficient information to admit or deny the allegations of Paragraph 50 and on that basis denies such allegations.

51. Shell denies the allegations of Paragraph 51.

52. Shell lacks sufficient information to admit or deny the allegations of Paragraph 52 and on that basis denies such allegations.

53. Shell lacks sufficient information to admit or deny the allegations of Paragraph 53, and on that basis denies such allegations.

54. Shell denies the allegations of Paragraph 54.

55. Shell denies the allegations of Paragraph 55.

56. Shell admits the allegations of Paragraph 56.

57. Shell admits that Motiva is a joint venture formed by Saudi, Texaco and Shell that refines and markets gasoline in certain eastern states, and that Shell, Texaco and Saudi have 35 percent, 32.5 percent and 32.5 percent interests, respectively, in Motiva. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 57.

58. Shell admits that Motiva began operations during July 1998 and has subsequently been in the business of refining, transporting, storing and marketing petroleum products, including gasoline, in certain eastern states. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 58.

59. Shell denies the allegations of Paragraph 59.

60. Shell lacks sufficient information to admit or deny the allegations of Paragraph 60 and on that basis denies such allegations.

61. Shell denies the allegations of Paragraph 61.

62. Shell lacks sufficient information to admit or deny the allegations of Paragraph 62 and on that basis denies such allegations.

63. Shell lacks sufficient information to admit or deny the allegations of Paragraph 63 and on that basis denies such allegations.

64. Shell lacks sufficient information to admit or deny the allegations of Paragraph 64 and on that basis denies such allegations.

65. Shell denies the allegations of Paragraph 65.

66. Shell admits the allegations of Paragraph 66.

67. Shell admits the allegations of Paragraph 67.

68. Shell denies the allegations of Paragraph 68.

69. Shell admits the allegations of Paragraph 69.

70. Shell admits the allegations of Paragraph 70.

71. Shell denies the allegations of Paragraph 71.

72. Shell denies the allegations of Paragraph 72.

73. Shell denies the allegations of Paragraph 73.

74. Shell denies the allegations of Paragraph 74.

75. Shell admits that, in or about March 1997, Shell and Texaco entered into a Memorandum of Understanding regarding the formation of a joint venture for refining and marketing of petroleum products in certain western and midwestern states, and that this joint venture was eventually named Equilon. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 75.

76. Shell admits that, on or about July 16, 1997, Shell, Texaco and Saudi entered into a Memorandum of Understanding regarding the formation of a joint venture for refining and marketing of petroleum products in certain eastern states, and that this joint venture was ultimately named Motiva. Except as expressly admitted or denied for

lack of sufficient information herein, Shell denies the allegations of Paragraph 76.

77. Shell denies the allegations of Paragraph 77.

78. Shell lacks sufficient information to admit or deny the allegations of Paragraph 78 with regard to actions by any other defendant herein, and on that basis denies such allegations. Shell admits that, prior to the formation of Equilon, it did not offer to sell its interest in any premises leased by a plaintiff to that plaintiff.

79. Shell denies the allegations of Paragraph 79.

80. Shell denies the allegations of Paragraph 80.

81. Shell denies the allegations of Paragraph 81.

82. Shell denies the allegations of Paragraph 82.

83. Shell denies the allegations of Paragraph 83.

84. Shell denies the allegations of Paragraph 84.

85. Shell denies the allegations of Paragraph 85.

86. Shell admits that, after the formation of Motiva, Motiva determined the prices at which it would sell gasoline to others. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 86.

87. Shell admits that some exploration, production, transportation, storage, refining, distribution, marketing and selling of crude oil and gasoline is carried on in and substantially affects interstate and foreign commerce. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 87.

88. Shell denies the allegations of Paragraph 88.

89. Shell denies the allegations of Paragraph 89.

90. Shell denies the allegations of Paragraph 90.

91. Shell lacks sufficient information to admit or deny the allegations of Paragraph 91 and on that basis denies such allegations.

92. Shell lacks sufficient information to admit or deny the allegations of Paragraph 92 and on that basis denies such allegations.

93. Shell denies the allegations of Paragraph 93.

94. Shell admits that Shell and Texaco competed in certain market(s) before the formation of Equilon and Motiva. Except as expressly admitted or denied for lack of sufficient information, Shell denies the allegations of Paragraph 94.

95. Shell denies the allegations of Paragraph 95.

96. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 96. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 96.

97. Shell denies the allegations of Paragraph 97.

98. Shell denies the allegations of Paragraph 98.

99. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 99. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 99.

100. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 100. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 100.

101. Shell denies the allegations of Paragraph 101.

102. Shell denies the allegations of Paragraph 102.

103. Shell denies the allegations of Paragraph 103.

104. Shell denies the allegations of Paragraph 104.

105. Shell denies the allegations of Paragraph 105.

106. Shell admits that Shell and Texaco competed in certain market(s) in the United States before the formation of Equilon. Except as expressly admitted or denied for lack of sufficient information herein, Shell denies the allegations of Paragraph 106.

107. Shell denies the allegations of Paragraph 107.

108. Shell denies the allegations of Paragraph 108.

109. Shell denies the allegations of Paragraph 109.

110. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 110. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 110.

111. Shell denies the allegations of Paragraph 111.

112. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 112. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 112.

113. By Order entered January 10, 2000, the Court dismissed the allegations in Paragraph 113. To the extent a further response is deemed to be required, Shell denies the allegations of Paragraph 113.

114. Shell denies the allegations of Paragraph 114.

FIRST AFFIRMATIVE DEFENSE

115. The Complaint and each purported claim therein fail to state facts sufficient to constitute a claim against Shell upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

116. Shell has at all times and in all relevant manners acted reasonably, as necessary to serve legitimate business purposes, in furtherance of trade, in good faith, and with the purpose and effect of promoting, encouraging, or increasing competition. Shell has not acted with the purpose or intent to suppress or restrain competition.

THIRD AFFIRMATIVE DEFENSE

117. Relevant government authorities reviewed the joint ventures that are the subject of the Complaint for any purported restraint on competition. The Federal Trade Commission entered into stipulated judgments with defendants herein in this regard. The instant Complaint is barred and/or preempted by the actions of the Federal Trade Commission with respect to the joint ventures.

FOURTH AFFIRMATIVE DEFENSE

118. The Complaint and each purported claim therein is barred by the doctrines of waiver, estoppel and laches in that plaintiffs have unreasonably and, on information and belief, intentionally, delayed to defendants' detriment in challenging the joint ventures that they now ask the Court dissolve.

FIFTH AFFIRMATIVE DEFENSE

119. Due to the unity of interest between and among the defendants, pursuant to the *Copperweld* doctrine, Shell is immune from claims that the actions alleged herein violate the Sherman Act.

SIXTH AFFIRMATIVE DEFENSE

120. Plaintiffs' claims and those of the purported class, and any recovery based thereon, are barred in whole or in part by plaintiffs' and the purported class members' failure to exercise due care to avoid, mitigate, or protect themselves from any damages that they allegedly sustained.

SEVENTH AFFIRMATIVE DEFENSE

121. Plaintiffs have no standing or capacity, individually or on behalf of the purported class, to maintain this action.

EIGHTH AFFIRMATIVE DEFENSE

122. Plaintiffs' Complaint is not a proper class action for a variety of reasons, including but not limited to the following: the purported class is not certifiable as such; Plaintiffs are not adequate representatives of the purported class and

cannot adequately protect the interests of the purported class; and the purported class has not suffered class-wide injury.

PRAYER

WHEREFORE, Shell prays for judgment as follows:

1. That plaintiffs take nothing by their Complaint;

2. That the Complaint be dismissed with prejudice;

3. That Shell recover its attorney's fees and expenses incurred in this action; and

4. That the Court grant such other relief as is just and proper.

DATED: February 8, 2000

MUNGER, TOLLES & OLSON LLP

By: /s/
Stuart N. Senator

Attorneys for Defendant
SHELL OIL COMPANY

[Proof of service omitted in printing]

[Filed Feb. 8, 2000]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Case caption omitted in printing]

ANSWER OF TEXACO INC.
TO SECOND AMENDED COMPLAINT
FOR DAMAGES AND INJUNCTIVE RELIEF
UNDER THE ANTITRUST LAWS

Defendant Texaco Inc. ("Texaco"), for itself alone, answers Plaintiffs' "Second Amended Complaint for Damages and Injunctive Relief under the Antitrust Laws" ("Complaint") as follows:

1. Texaco admits that plaintiffs purport to bring this action on behalf of themselves and other entities and persons described in Paragraph 1 but denies they are entitled to bring such action and further denies the remainder of the allegations in Paragraph 1.

2. Texaco admits that plaintiffs purport to bring this action against the defendants named in Paragraph 2 and to demand a jury trial but denies they are entitled to bring such action. By Stipulation and Order dated December 21, 1999, Equilon Enterprises LLC, Motiva Enterprises LLC, Equiva Trading Company and Equiva Services LLC were dismissed from this lawsuit and are no longer defendants. Texaco denies the remainder of the allegations in Paragraph 2.

3. Texaco admits that the United States District Courts have subject matter jurisdiction over actions brought under the Sherman Act. Texaco denies the remainder of the allegations in Paragraph 3.

4. Texaco denies that the plaintiffs are entitled to maintain such action on behalf of persons similarly situated. Texaco lacks sufficient knowledge or information to admit or deny the remainder of the allegations in Paragraph 4 and on that basis denies such allegations.

5. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 5 and on that basis denies such allegations.

6. Texaco denies the allegations in Paragraph 6.

7. Texaco denies the allegations in Paragraph 7.

8. Texaco denies the allegations in Paragraph 8.

9. Texaco denies the allegations in Paragraph 9.

10. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 10 and on that basis denies such allegations.

11. Texaco lacks sufficient information to admit or deny the allegations in Paragraph 11 and on that basis denies such allegations.

12. Texaco denies the allegations in Paragraph 12.

13. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 13 and on that basis denies such allegations.

14. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 14 and on that basis denies such allegations.

15. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 15 and on that basis denies such allegations.

16. Texaco admits that Saudi, Shell and Texaco have formed two joint ventures, reviewed by relevant government authorities, that engages in refining and marketing of gasoline and other petroleum products in portions of the United States and that some meetings took place in connection with the formation of those joint ventures. Texaco denies the remainder of the allegations in Paragraph 16.

17. Texaco admits that Saudi, Shell and Texaco no longer compete among themselves in the refining and marketing of branded gasoline and other petroleum products in portions of

the United States. Texaco denies the remainder of the allegations in Paragraph 17.

18. Texaco admits that Saudi, Shell and Texaco have formed a joint venture, reviewed by relevant government authorities, that engages in refining and marketing of branded gasoline and other petroleum products in portions of the United States. Texaco denies the remainder of the allegations in Paragraph 18.

19. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 19 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 19.

20. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 20 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 20.

21. Texaco denies the allegations of Paragraph 21.

22. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 22 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 22.

23. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 23

requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 23.

24. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 24 and on that basis denies such allegations.

25. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 25 and on that basis denies such allegations.

26. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 26 and on that basis denies such allegations.

27. Texaco admits that Saudi, Shell and Texaco have formed two joint ventures, reviewed by relevant government authorities, that engages in refining and marketing of branded gasoline and other petroleum products in portions of the United States and that some meetings took place in connection with the formation of those joint ventures. Texaco denies the remainder of the allegations in Paragraph 27.

28. Texaco admits that Saudi, Shell and Texaco have formed a joint venture, reviewed by relevant government authorities, that engages in refining and marketing of branded gasoline and other petroleum products in portions of the United States. Texaco admits that Saudi, Shell and Texaco no longer compete among themselves in the refining and marketing of branded gasoline and other petroleum products in portions of the United States. Texaco denies the remainder of the allegations in Paragraph 28.

29. Texaco admits that Saudi, Shell and Texaco have formed a joint venture, reviewed by relevant government authorities, that engages in refining and marketing of branded gasoline and other petroleum products in portions of the United States. Texaco denies the remainder of the allegations in Paragraph 29.

30. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 30 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 30.

31. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 31 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 31.

32. Texaco denies the allegations in Paragraph 32.

33. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 33 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 33.

34. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 34 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 34.

35. Texaco admits the allegations in Paragraph 35.

36. Texaco admits that during certain time periods it and/or its subsidiaries and affiliates have engaged in the business of exploring for and producing crude oil, and have refined, marketed, transported, and stored crude oil and petroleum products, including gasoline, in certain states. Texaco admits that upon the formation of the joint ventures with

Shell and Saudi, it exited the refining, distributing and marketing of branded gasoline in the United States. Texaco denies the remainder of the allegations in Paragraph 36.

37. Texaco admits that it and/or its subsidiaries and affiliates produce oil and natural gas and engage in manufacturing, transportation and marketing of oil and natural gas. Texaco denies the remainder of the allegations in Paragraph 37.

38. Texaco admits that Saudi, Shell and Texaco have formed two joint ventures, reviewed by relevant government authorities, that engages in refining and marketing of gasoline and other petroleum products in portions of the United States and that some meetings took place in connection with the formation of those joint ventures. Texaco denies the remainder of the allegations in Paragraph 38.

39. Texaco admits that Saudi, Shell and Texaco have formed a joint venture, reviewed by relevant government authorities, that engages in refining and marketing of gasoline and other petroleum products in portions of the United States. Texaco admits that Saudi, Shell and Texaco no longer compete among themselves in the refining and marketing of branded gasoline and other petroleum products in portions of the United States. Texaco denies the remainder of the allegations in 39.

40. Texaco denies the allegations of Paragraph 40.

41. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 41 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 41.

42. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs'

Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 42 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 42.

43. Texaco denies the allegations of Paragraph 43.

44. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 44 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 44.

45. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 45 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 45.

46. Texaco admits the allegations in Paragraph 46.

47. Texaco admits that Equilon is a joint venture formed by Shell and Texaco that refines and markets branded petroleum products in certain western and midwestern states, and that Shell and Texaco have 56 percent and 44 percent interests, respectively, in Equilon. Texaco denies the remainder of the allegations in Paragraph 47.

48. Texaco admits the allegations in Paragraph 48.

49. Texaco admits that Equilon refines or markets branded gasoline under the Shell and Texaco brand names in all or parts of 31 states and provides branded product to approximately 9000 Shell and Texaco branded retail outlets. Texaco denies the remainder of the allegations in Paragraph 49.

50. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 50 and on that basis denies such allegations.

51. Texaco admits that Equilon's 1998 annual sales revenue was approximately $22 billion. Texaco denies the remainder of the allegations in Paragraph 51.

52. Texaco states that market share is not a constant number and may change on a continually basis. Texaco admits that as of October, 1999, Equilon was number one in market share in Arkansas, Oregon, Missouri, and Washington. Texaco admits that as of October, 1999, Equilon was number two in market share in Alaska, Arizona, Hawaii, Illinois, Indiana, Nebraska, Nevada, New Mexico, South Dakota and Wyoming. Texaco denies the remainder of the allegations in Paragraph 52.

53. Texaco admits that Equilon has five refineries that refine approximately 775,000 barrels per day. Texaco admits that Equilon operates approximately 55 proprietary terminals throughout the Mid-continent and Western states for crude oil and refined products. Texaco denies the remainder of the allegations in Paragraph 52.

54. Texaco admits that Equilon operates or owns an interest in approximately 30,000 miles of pipeline in 34 states. Texaco denies the remainder of the allegations in Paragraph 53.

55. Texaco denies the allegations in Paragraph 54.

56. Texaco admits the allegations in Paragraph 56.

57. Texaco admits that Motiva is a joint venture formed by Saudi, Shell and Texaco that refines and markets branded gasoline in certain eastern states, and that Shell, Texaco and Saudi have 35 percent, 32.5 percent and 32.5 percent interests, respectively, in Motiva. Texaco denies the remainder the allegations in Paragraph 57.

58. Texaco admits that Motiva began operations during July 1998 and has subsequently been in the business of

refining, transporting, storing and marketing petroleum products, including branded gasoline, in certain eastern states. Texaco denies the remainder of the allegations in Paragraph 58.

59. Texaco admits that Motiva refines or markets branded gasoline under the Shell and Texaco brand names in all or part of 26 states and Washington, D.C. and provides product to approximately 14,000 Shell branded and Texaco branded retail outlets. Texaco denies the remainder of the allegations in Paragraph 59.

60. Texaco lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 60 and on that basis denies such allegations.

61. Texaco admits that Motiva's 1998 sales revenue was approximately $5.4 billion. Texaco denies the remainder of the allegations in Paragraph 61.

62. Texaco states that market is not a constant number and may change on a continually basis. Texaco admits that as of October, 1999, Motiva was number one in market share in Alabama, Delaware, Florida, Louisiana, Maryland, Mississippi, North Carolina, Rhode Island, Tennessee, Texas and Virginia. Texaco denies the remainder of the allegations in Paragraph 62.

63. Texaco states that market is not a constant number and may change on a continually basis. Texaco admits that as of October, 1999, Motiva was number two in market share in Connecticut, Georgia, Massachusetts, new Hampshire, New Jersey and South Carolina. Texaco denies the remainder of the allegations in Paragraph 63.

64. Texaco admits that Motiva has four refineries that refine approximately 825,000 barrels per day. Texaco admits that Motiva operates approximately 49 proprietary terminals in the Northeast, Southeast and Gulf Coast states. Texaco denies the remainder of the allegations in Paragraph 64.

65. Texaco denies the allegations in Paragraph 65.

66. Texaco admits the allegations in Paragraph 66.

67. Texaco admits the allegations in Paragraph 67.

68. Texaco denies the allegations in Paragraph 68.

69. Texaco admits the allegations in Paragraph 69.

70. Texaco admits the allegations in Paragraph 70.

71. Texaco denies the allegations in Paragraph 71.

72. Texaco denies the allegations in Paragraph 72.

73. Texaco denies the allegations in Paragraph 73.

74. Texaco denies the allegations in Paragraph 74.

75. Texaco admits that, in or about March 1997, Shell and Texaco entered into a Memorandum of Understanding regarding the formation of a joint venture for refining and marketing of branded petroleum products in certain western and midwestern states, and that this joint venture was eventually named Equilon. Texaco denies the remainder of the allegations in Paragraph 75.

76. Texaco admits that, on or about July 16, 1997, Shell, Texaco and Saudi entered into a Memorandum of Understanding regarding the formation of a joint venture for refining and marketing of branded petroleum products in certain eastern states, and that this joint venture was ultimately named Motiva. Texaco denies the remainder of the allegations in Paragraph 76.

77. Texaco admits that it offered various rent programs to gasoline dealers selling its branded gasoline prior to the formation of Equilon. Texaco denies the remainder of the allegations in Paragraph 77.

78. Texaco denies the allegations in Paragraph 78.

79. Texaco denies the allegations in Paragraph 79.

80. Texaco denies the allegations in Paragraph 80.

81. Texaco denies the allegations in Paragraph 81.

82. Texaco admits that, after the formation of Equilon, Equilon unilaterally determines the prices at which it sells branded gasoline to independent Shell and Texaco branded dealers. Texaco denies the remainder of the allegations in Paragraph 82.

83. Texaco denies the allegations in Paragraph 83.

84. Texaco denies the allegations in Paragraph 84.

85. Texaco denies the allegations in Paragraph 85.

86. Texaco admits that, after the formation of Motiva, Motiva unilaterally determines the prices at which it sells branded gasoline to independent Shell and Texaco branded dealers. Texaco denies the remainder of the allegations in Paragraph 86.

87. Texaco denies the allegations in Paragraph 87.

88. Texaco denies the allegations in Paragraph 88.

89. Texaco denies the allegations in Paragraph 89.

90. Texaco denies the allegations in Paragraph 90.

91. Texaco denies the allegations in Paragraph 91.

92. Texaco denies the allegations in Paragraph 92.

93. Texaco denies the allegations in Paragraph 93.

94. Texaco admits that Shell and Texaco competed in certain markets before the formation of Equilon and Motiva. Shell and Texaco still compete in certain markets but no longer compete in their downstream operations, which include the refining, distribution and marketing of branded gasoline. Texaco denies the remainder of the allegations in Paragraph 94.

95. Texaco denies the allegations in Paragraph 95.

96. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 96

requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 96.

97. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 97 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 97.

98. Texaco states that by Stipulation and Order dated December 21, 1999, Equilon Enterprises LLC, Motiva Enterprises LLC, Equiva Trading Company and Equiva Services LLC were dismissed from this lawsuit and are no longer defendants. Texaco submits that no response is required to Paragraph 98. To the extent that a response is required, Texaco denies the allegations in Paragraph 98.

99. Texaco states that by Stipulation and Order dated December 21, 1999, Equilon Enterprises LLC, Motiva Enterprises LLC, Equiva Trading Company and Equiva Services LLC were dismissed from this lawsuit and are no longer defendants. Texaco submits that no response is required to Paragraph 99. To the extent that a response is required, Texaco denies the allegations in Paragraph 99.

100. Texaco states that by Stipulation and Order dated December 21, 1999, Equilon Enterprises LLC, Motiva Enterprises LLC, Equiva Trading Company and Equiva Services LLC were dismissed from this lawsuit and are no longer defendants. Texaco submits that no response is required to Paragraph 100. To the extent that a response is required, Texaco denies the allegations in Paragraph 100.

101. Texaco denies the allegations in Paragraph 101.

102. Texaco denies the allegations in Paragraph 102.

103. Texaco denies the allegations in Paragraph 103.

104. Texaco denies the allegations of Paragraph 104.

105. Texaco denies the allegations of Paragraph 105.

106. Texaco admits that Shell and Texaco competed in certain markets before the formation of Equilon and Motiva. Shell and Texaco still compete in certain markets but no longer compete in their downstream operations, which include the refining, distribution and marketing of branded gasoline. Texaco denies the remainder of the allegations in Paragraph 106.

107. Texaco denies the allegations of Paragraph 107.

108. Texaco denies the allegations of Paragraph 108.

109. Texaco denies the allegations of Paragraph 109.

110. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 110 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 110.

111. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 111 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 111.

112. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and customers. Therefore, Texaco submits that Paragraph 112 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 112.

113. Texaco states that because the Plaintiffs have failed to amend their division of markets and customers allegations, the Court's January 10, 2000 Order dismissed Plaintiffs' Section 1 claims based upon alleged division of markets and

customers. Therefore, Texaco submits that Paragraph 113 requires no response. To the extent any response is required, Texaco denies the allegations in Paragraph 113.

114. Texaco denies the allegations of Paragraph 114.

FIRST AFFIRMATIVE DEFENSE

115. The Complaint and each purported claim therein fails to state facts sufficient to constitute a claim against Texaco upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

116. Texaco has at all times and in all relevant manners acted reasonably as necessary to serve legitimate business purposes, in furtherance of trade, in good faith, and with the purpose and effect of promoting, encouraging, or increasing competition. Texaco has not acted with the purpose or intent to suppress or restrain competition.

THIRD AFFIRMATIVE DEFENSE

117. Relevant government authorities reviewed the joint ventures that are the subject of the Complaint for any purported restraint on competition. The Federal Trade Commission entered into stipulated judgments with defendants herein in this regard. The instant Complaint is barred and/or preempted by the actions of the Federal Trade Commission with respect to the joint ventures.

FOURTH AFFIRMATIVE DEFENSE

118. The Complaint and each purported claim therein is barred by the doctrines of waiver, estoppel and laches in that plaintiffs have unreasonably and, on information and belief, intentionally, delayed to defendants' detriment in challenging the joint ventures that they now ask the Court to dissolve.

FIFTH AFFIRMATIVE DEFENSE

119. Due to the unity of interest between and among the defendants, pursuant to the *Copperweld* doctrine, Texaco is

immune from claims that the actions alleged herein violate the Sherman Act.

SIXTH AFFIRMATIVE DEFENSE

120. Plaintiffs have no standing or capacity, individually or on behalf of the purported class, to maintain this action against Texaco.

SEVENTH AFFIRMATIVE DEFENSE

121. Plaintiffs' Complaint is not a proper class action for a variety of reason, including but not limited to the following: the purported class is not certifiable as such; Plaintiffs are not adequate representatives of the purported class and cannot adequately protect the interests of the purported class; that individual issues predominate over common ones; and the purported class has not suffered class-wide injury.

PRAYER

WHEREFORE, Texaco prays for judgment as follows:

1. That plaintiffs take nothing by their Complaint;

2. That the Complaint be dismissed with prejudice;

3. That Texaco recover its attorney's fees and expenses incurred in this action and

4. That the Court grant such other relief as is just and proper.

Respectfully submitted,

/s/

Thomas J. Nolan
Dale J. Giali
HOWREY SIMON
ARNOLD & WHITE, LLP

* * *

Attorneys for Texaco Inc.

Dated: February 8, 2000

[Proof of service omitted in printing]

[Filed Feb. 8, 2000]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Case caption omitted in printing]

ANSWER OF SAUDI REFINING, INC.
TO SECOND AMENDED COMPLAINT

Defendant SAUDI REFINING, INC. ("SRI"), for itself alone, answers plaintiffs' Second Amended Complaint (the "Complaint"), as follows:

1. SRI admits that plaintiffs purport to bring this action on behalf of themselves and other entities and persons described in paragraph 1. Except as expressly admitted, SRI lacks knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in paragraph 1 and on that basis denies such averments.

2. SRI admits that plaintiffs purport to bring this action against the defendants named in paragraph 2 and to demand a jury. Except as expressly admitted, SRI lacks knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in paragraph 2 and on that basis denies such averments.

3. SRI admits that United States District Courts have subject matter jurisdiction over Sherman Act claims. Except as expressly admitted, SRI lacks knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in paragraph 3 and on that basis denies such averments.

4. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 4 and on that basis denies such averments.

5. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 5 and on that basis denies such averments.

6. SRI denies the averments contained in paragraph 6.

7. SRI denies the averments contained in paragraph 7.

8. SRI denies the averments contained in paragraph 8.

9. SRI denies the averments contained in paragraph 9.

10. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 10 and on that basis denies such averments.

11. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 11 and on that basis denies such averments.

12. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 12 and on that basis denies such averments.

13. SRI admits that it is a corporation with its headquarters and principal place of business in Houston, Texas, that it is a corporate affiliate of Saudi Aramco and that Saudi Aramco is owned by the Kingdom of Saudi Arabia, and that Saudi Arabia is a principal member of OPEC. Except as expressly admitted, SRI denies the remaining averments contained in paragraph 13.

14. SRI admits that it has been indirectly engaged in the transporting of crude oil. SRI admits that it owns an interest in Motiva Enterprises LLC ("Motiva") and that Motiva is engaged in refining, transporting, storing and marketing petroleum products, including gasoline, in some areas of the United States. Except as expressly admitted, SRI denies the remaining averments contained in paragraph 14.

15. SRI denies the averments contained in paragraph 15.

16. SRI denies the averments contained in paragraph 16.

17. SRI denies the averments contained in paragraph 17.

18. SRI denies the averments contained in paragraph 18.

19. SRI denies the averments contained in paragraph 19.

20. SRI denies the averments contained in paragraph 20.

21. SRI denies the averments contained in paragraph 21.

22. SRI denies the averments contained in paragraph 22.

23. SRI denies the averments contained in paragraph 23.

24. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 24 and on that basis denies such averments.

25. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 25 and on that basis denies such averments.

26. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 26 and on that basis denies such averments.

27. SRI denies the averments contained in paragraph 27.

28. SRI lacks sufficient information to admit or deny the averments of paragraph 28 concerning any knowledge or understanding of the Chairman of Shell and on that basis denies such averments. Except as expressly admitted or denied for lack of sufficient information, SRI denies the remaining averments of paragraph 28.

29. SRI lacks sufficient information to admit or deny the averments of paragraph 29 concerning any knowledge or understanding of the Chairman of Shell and on that basis denies such averments. Except as expressly admitted or denied for lack of sufficient information, SRI denies the remaining averments of paragraph 29.

30. SRI lacks sufficient information to admit or deny the averments of paragraph 30 concerning any knowledge or understanding of the Chairman of Shell and on that basis denies such averments. Except as expressly admitted or denied for lack of sufficient information, SRI denies the remaining averments of paragraph 30.

31. SRI lacks sufficient information to admit or deny the averments of paragraph 31 concerning any knowledge or understanding of the Chairman of Shell and on that basis

denies such averments. Except as expressly admitted or denied for lack of sufficient information, SRI denies the remaining averments of paragraph 31.

32. SRI denies the averments contained in paragraph 32.

33. SRI denies the averments contained in paragraph 33.

34. SRI denies the averments contained in paragraph 34.

35. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 35 and on that basis denies such averments.

36. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 36 and on that basis denies such averments.

37. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 37 and on that basis denies such averments.

38. SRI denies the averments contained in paragraph 38.

39. SRI lacks sufficient information to admit or deny the averments of paragraph 39 concerning any knowledge or understanding of the Chairman of Texaco and on that basis denies such averments. Except as expressly admitted or denied for lack of sufficient information, SRI denies the remaining averments of paragraph 39.

40. SRI lacks sufficient information to admit or deny the averments of paragraph 40 concerning any knowledge or understanding of the Chairman of Texaco and on that basis denies such averments. Except as expressly admitted or denied for lack of sufficient information, SRI denies the remaining averments of paragraph 40.

41. SRI lacks sufficient information to admit or deny the averments of paragraph 41 concerning any knowledge or understanding of the Chairman of Texaco and on that basis denies such averments. Except as expressly admitted or denied for lack of sufficient information, SRI denies the remaining averments of paragraph 41.

42. SRI lacks sufficient information to admit or deny the averments of paragraph 42 concerning any knowledge or understanding of the Chairman of Texaco and on that basis denies such averments. Except as expressly admitted or denied for lack of sufficient information, SRI denies the remaining averments of paragraph 42.

43. SRI denies the averments contained in paragraph 43.

44. SRI denies the averments contained in paragraph 44.

45. SRI denies the averments contained in paragraph 45.

46. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 46 and on that basis denies such averments.

47. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 47 and on that basis denies such averments.

48. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 48 and on that basis denies such averments.

49. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 49 and on that basis denies such averments.

50. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 50 and on that basis denies such averments.

51. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 51 and on that basis denies such averments.

52. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 52 and on that basis denies such averments.

53. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 53 and on that basis denies such averments.

54. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 54 and on that basis denies such averments.

55. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 55 and on that basis denies such averments.

56. SRI admits the averments contained in paragraph 56.

57. SRI admits that Motiva is a Limited Liability Company formed by SRI, Shell, an affiliate of Shell and an affiliate of Texaco. SRI further admits that Motiva refines, transports, stores and markets petroleum products, including gasoline, in certain Gulf Coast and Eastern regions of the United States. SRI admits that it has a 32.5 percent interest in Motiva. Except as expressly admitted, SRI denies the remaining averments of paragraph 57.

58. SRI admits that Motiva began operations during July 1998 and has subsequently been in the business of refining, transporting, storing and marketing petroleum products, including gasoline, in certain Gulf Coast and Eastern regions of the United States. Except as expressly admitted, SRI denies the remaining averments of paragraph 58.

59. SRI admits that Motiva refines crude oil and markets gasoline to Shell and Texaco branded retail outlets in 26 states and the District of Columbia. Except as expressly admitted, SRI denies the remaining averments of paragraph 59.

60. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 60 and on that basis denies such averments.

61. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 61 and on that basis denies such averments.

62. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 62 and on that basis denies such averments.

63. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 63 and on that basis denies such averments.

64. SRI admits that Motiva owns an interest in four refineries. SRI lacks knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in paragraph 64 and on that basis denies such averments.

65. SRI denies the averments contained in paragraph 65.

66. SRI admits the averments contained in paragraph 66.

67. SRI admits the averments contained in paragraph 67.

68. SRI denies the averments contained in paragraph 68.

69. SRI admits the averments contained in paragraph 69.

70. SRI admits the averments contained in paragraph 70.

71. SRI denies the averments contained in paragraph 71.

72. SRI denies the averments contained in paragraph 72.

73. SRI denies the averments contained in paragraph 73.

74. SRI denies the averments contained in paragraph 74.

75. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 75 and on that basis denies such averments.

76. SRI admits that, on or about July 16, 1997, Shell, Texaco and SRI entered into a Memorandum of Understanding regarding the formation of a joint venture for refining and marketing of petroleum products in certain Gulf Coast and Eastern regions of the United States, and that this joint venture was ultimately named Motiva. Except as expressly admitted, SRI denies the remaining averments of paragraph 76.

77. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 77 and on that basis denies such averments.

78. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 78 and on that basis denies such averments.

79. SRI denies the averments contained in paragraph 79.

80. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 80 and on that basis denies such averments.

81. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 81 and on that basis denies such averments.

82. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 82 and on that basis denies such averments.

83. SRI denies the averments contained in paragraph 83.

84. SRI denies the averments contained in paragraph 84.

85. SRI denies the averments contained in paragraph 85.

86. SRI admits that Motiva determines the prices at which it sells gasoline to others. Except as expressly admitted, SRI denies the remaining averments of paragraph 86.

87. SRI admits that some exploration, production, transportation, storage, refining, distribution, marketing and selling of crude oil and gasoline is carried on in and affects interstate and foreign commerce. Except as expressly admitted, SRI denies the remaining averments of paragraph 87.

88. SRI denies the averments contained in paragraph 88.

89. SRI denies the averments contained in paragraph 89.

90. SRI denies the averments contained in paragraph 90.

91. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 91 and on that basis denies such averments.

92. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 92 and on that basis denies such averments.

93. SRI denies the averments contained in paragraph 93.

94. SRI admits that SRI, Shell and Texaco competed in certain market(s) before the formation of Equilon and Motiva. Except as expressly admitted, SRI denies the remaining averments of paragraph 94.

95. SRI denies the averments contained in paragraph 95.

96. SRI denies the averments contained in paragraph 96.

97. SRI denies the averments contained in paragraph 97.

98. SRI denies the averments contained in paragraph 98.

99. SRI denies the averments contained in paragraph 99.

100. SRI denies the averments contained in paragraph 100.

101. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 101 and on that basis denies such averments.

102. SRI denies the averments contained in paragraph 102.

103. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 103 and on that basis denies such averments.

104. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 104 and on that basis denies such averments.

105. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 105 and on that basis denies such averments.

106. SRI lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 106 and on that basis denies such averments.

107. SRI denies the averments contained in paragraph 107.

108. SRI denies the averments contained in paragraph 108.

109. SRI denies the averments contained in paragraph 109.

110. SRI denies the averments contained in paragraph 110.

111. SRI denies the averments contained in paragraph 111.

112. SRI denies the averments contained in paragraph 112.

113. SRI denies the averments contained in paragraph 113.

114. SRI denies the averments contained in paragraph 114.

AFFIRMATIVE DEFENSES

As and for its separate and affirmative defenses, SRI alleges as follows:

FIRST AFFIRMATIVE DEFENSE

115. The Complaint, and each claim alleged therein, fails to state facts sufficient to constitute a claim against SRI upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

116. SRI has at all times and in all relevant manners acted ~~reasonably~~, as necessary to serve legitimate business purposes, in furtherance of trade, in good faith, and with the purpose and effect of promoting, encouraging, and/or increasing competition. SRI has not acted with the purpose or intent to suppress or restrain competition.

THIRD AFFIRMATIVE DEFENSE

117. Relevant government authorities reviewed the joint ventures that are the subject of the Complaint for any purported restraint on competition. The Federal Trade Commission entered into stipulated judgments with defendants herein in this regard. The instant Complaint is barred and/or preempted by the actions of the Federal Trade Commission with respect to the joint ventures.

FOURTH AFFIRMATIVE DEFENSE

118. The Complaint, and each claim alleged therein, is barred by the doctrines of waiver, estoppel and laches in that plaintiffs have unreasonably and, on information and belief, intentionally, delayed to defendants' detriment in

challenging the joint ventures they now ask the Court to dissolve.

FIFTH AFFIRMATIVE DEFENSE

119. Due to the unity of interest between and among the defendants, pursuant to the *Copperweld* doctrine, SRI is immune from claims that the actions alleged herein violate the Sherman Act.

SIXTH AFFIRMATIVE DEFENSE

120. Plaintiffs' claims and those of the purported class, and any recovery based thereon, are barred in whole or in part by plaintiffs' and the purported class members' failure to exercise due care to avoid, mitigate, or protect themselves from any damages that they allegedly sustained.

SEVENTH AFFIRMATIVE DEFENSE

121. Plaintiffs have no standing or capacity, individually or on behalf of the purported class, to maintain this action against SRI.

EIGHTH AFFIRMATIVE DEFENSE

122. Plaintiffs' Complaint is not a proper class action for a variety of reasons, including but not limited to the following: the purported class is not certifiable as such; plaintiffs are not adequate representatives of the purported class and cannot adequately protect the interests of the purported class and the purported class has not suffered class-wide injury.

PRAYER

WHEREFORE, SRI prays for judgment as follows:

1. That plaintiffs take nothing by their Complaint;

2. That the Complaint be dismissed with prejudice;

3. That SRI recover its attorney's fees and expenses incurred in this action; and

4. That the Court grant such other relief as it deems just and proper.

DATED: February 7, 2000 WHITE & CASE LLP

By: /s/

Bryan A. Merryman
Attorneys for Defendant
SAUDI REFINING, INC.

[Proof of service omitted in printing]

[Filed Oct. 5, 2001]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Case caption omitted in printing.]

JOINT STIPULATION OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW, INCLUDING PROPOSED ORDERS

[RESUBMITTED PURSUANT TO ORDER OF SEPTEMBER 13, 2001]

FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER ENTERED MARCH 23, 2000

[Listing of counsel omitted in printing.]

Pursuant to Local Rule 7.14.1 of the Central District of California, the parties submit this Statement of Uncontroverted Facts in support of their respective motions for summary judgment.[1] This joint stipulation contains the following sections: statement of facts agreed by all parties to be undisputed; plaintiffs' statement of additional facts believed by plaintiffs to be undisputed and responses by defendants; and defendants' statement of additional facts believed by defendants to be undisputed and responses by plaintiffs. The parties submit and have previously submitted declarations and supporting documentation in support of factual propositions as to which there is no stipulation. *See* Court's Order of September 13, 2001.

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[1] In light of the Court's order that the parties submit a joint motion for summary judgment, the parties do not submit separate Statements of Genuine Issues pursuant to L.R. 7.14.2. Instead, the parties submit, along with a Statement of Uncontroverted Facts, separate sections containing facts believed to be uncontroverted by the parties, with responses by opposing parties. The parties do not concede that the facts stated by opposing parties in these separate sections are actually material or undisputed.

STATEMENT OF UNCONTROVERTED FACTS AGREED TO BY ALL PARTIES

1. Defendant Saudi Refining Inc. ("SRI") is a corporation with its headquarters and principal place of business in Houston, Texas. SRI is a corporate affiliate of Saudi Arabian Oil Co. ("Saudi Aramco").

2. Defendant Shell Oil Company ("Shell") is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its headquarters and principal place of business at One Shell Plaza, Houston, Texas. Shell is a subsidiary of the Royal Dutch/Shell Group, which is comprised of Royal Dutch Petroleum Company (domiciled in the Netherlands) and the Shell Transport and Trading Company (domiciled in the United Kingdom). Shell and/or some of its subsidiaries and affiliates are engaged in the business of exploring for and producing crude oil, and have refined, marketed, transported, and stored crude oil and petroleum products, including gasoline, in certain states of the United States.

3. Defendant Texaco Inc., ("Texaco") is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its headquarters and principal place of business at 2000 Westchester Avenue, White Plains, New York. Texaco and/or some of its subsidiaries and affiliates have engaged in the business of exploring for and producing crude oil, and have refined, marketed, transported, and stored crude oil and petroleum products, including gasoline, in certain states of the United States.

4. During the period from 1989 to 1998, SRI and Texaco did business in certain parts of the Eastern United States through a joint venture entitled Star Enterprise. Star Enterprise engaged in the refining and marketing of gasoline under the Texaco brand. Star Enterprise was formed when SRI purchased certain refining and marketing assets from Texaco and then contributed those assets to Star Enterprise in connection with its formation.

5. Plaintiffs are residents of the Central District of California who operate or previously operated Shell or Texaco branded gasoline stations in California. Prior to the formation of the joint ventures, plaintiffs purchased branded gasoline from Shell or Texaco.

6. Equilon Enterprises LLC ("Equilon") is a Delaware limited liability company that was formed as of January 1, 1998. A general overview of the principal Equilon agreements is contained in PX 330 (at 8-57) and a list of the agreements is contained in PX 1 (at pp. iii and iv).

7. Motiva Enterprises LLC ("Motiva") is a Delaware limited liability company that was formed as of July 1, 1998. A general overview of the principal Motiva agreements is contained in PX 330 (at 8-57) and a list of the agreements is contained in PX 5 (at pp. iii and iv).

8. Subsequent to the formation of Equilon, plaintiffs purchased branded gasoline from Equilon.

9. Plaintiffs have never purchased gasoline from SRI, Star or Motiva.

10. Equilon and Motiva refine gasoline and sell it directly to independent Texaco and Shell service station operators who either own the service station they operate or lease the service station from Equilon or Motiva or through independent distributors. Some branded service stations are owned directly by Equilon and Motiva.

11. Plaintiffs purport to bring this action on behalf of a nationwide class of operators of Shell and Texaco gasoline stations.

12. Major oil companies such as Shell and Texaco speak of "upstream" and "downstream" operations. Crude oil is the raw product from which gasoline is made at a refinery. Upstream operations consist of exploring for and producing crude oil, and downstream operations consist of refining crude into gasoline and other products and marketing the finished products.

13. Gasoline is sold in the United States at the retail level at which it is sold to the ultimate consumer, and the wholesale level at which it is sold to a retailer or reseller.

14. Prior to the formation of Equilon and Motiva, Texaco and Shell independently produced gasoline from their United States refineries and independently sold it directly to service station operators or to distributors.

15. Prior to the formation of Equilon and Motiva, Shell, Texaco and Star sold and marketed gasoline at both the wholesale and retail levels: The wholesale level consisted of selling branded gasoline in bulk to retailers and resellers, and the retail level consisted of selling branded gasoline to consumers from company-operated service stations.

16. The Dealer Tankwagon Price ("DTW") is the gasoline price Equilon charges independent service station operators that purchase gasoline directly from Equilon.

17. The Dealer Tankwagon Price ("DTW") is the gasoline price Motiva charges independent service station operators that purchase gasoline directly from Motiva.

18. The DTW prices for the Equilon territory are set by Equilon.

19. Equilon sets DTW prices for thousands of different market areas.

20. The DTW prices for the Motiva territory are set by Motiva.

21. Motiva sets DTW prices for thousands of different market areas.

22. The wholesale (or rack) price is the gasoline price charged for large volume deliveries at the refineries.

23. The retail price of gasoline is the price independent service station operators charge the consumer at the pump.

24. The retail price of gasoline is set by each individual service station operator.

25. Prior to the formation of Equilon and Motiva, Texaco and Shell independently and separately maintained and operated the refining and marketing of their gasoline.

26. Prior to the formation of Equilon and Motiva, Texaco set Texaco's DTW and wholesale prices within Texaco's refining and marketing organization.

27. Prior to the formation of Equilon and Motiva, Shell set Shell's DTW and wholesale prices within Shell's refining and marketing organization.

28. In Texaco, the wholesale and DTW price for its gasoline for the Western United States was determined within a business unit named Texaco Refining and Marketing ("TRMI").

29. The wholesale and DTW price of Texaco gasoline for the Eastern United States was determined by Star.

30. In Shell, the wholesale and DTW price for its gasoline was determined within the marketing department.

31. Shell, Texaco, and SRI each considered the refining and marketing businesses to be intensely competitive and expected this intense competition to continue.

32. Texaco and Shell and SRI regarded worldwide excess capacity as a contributing factor in the depressed economic conditions in the industry.

33. Shell initially approached Texaco in March of 1996. The scope of these discussions grew until they eventually included discussions regarding the consolidation of Shell's and Texaco's downstream assets in the United States.

34. Star eventually joined the discussions with Shell.

35. From the time Texaco, Shell and Star began their discussions, they believed that the oil industry was about to enter a period of consolidation. They were aware that BP and Mobil had combined in Europe, and thought that other oil companies were likely to be entering into similar combinations in the United States.

36. The parties established a synergy team and steering committee comprised of employees from Texaco, Shell and Star to explore whether consolidation could be accomplished.

37. The synergy team exchanged among themselves information concerning historical refining and marketing margins.

38. The synergy team also exchanged revenue and profitability forecasts using agreed-upon margin assumptions.

39. In June of 1996, the synergy team determined and reported that the combination of their downstream operations had the potential for cost reductions of approximately $800 million annually, $250 million attributable to Motiva and $550 million attributable to Equilon.

40. Encouraged by the report of the synergy team, the defendants formed negotiating teams to formulate the terms of the combination, including the value of the assets to be contributed by each defendant.

41. During the negotiation of Equilon and Motiva, Texaco and Shell negotiated a standstill agreement, under which Shell agreed that it would not initiate a takeover of Texaco during the negotiations and for a specified period thereafter.

42. The formation of Equilon ended competition between Shell and Texaco in the Western United States with respect to the downstream refining and marketing of gasoline.

43. The ownership and gains or losses of Equilon are allocated in proportion to the assets contributed to Equilon by each of the parent corporations. Shell owns 56% and Texaco owns 44% of Equilon.

44. Texaco and SRI had previously formed Star, which included the downstream gasoline refining and marketing assets of both Texaco and SRI. Star was terminated and unwound and the Star assets and liabilities were placed into Motiva.

45. The formation of Motiva ended competition between Shell and Star in the Eastern United States with respect to the downstream refining and marketing of gasoline.

46. Under the terms of the Motiva formation agreements, Texaco, Shell and SRI agreed to share the risks and losses associated with Motiva.

47. The ownership and gains or losses of Motiva are allocated in proportion to the assets contributed to Motiva by each of the parent corporations. Shell owns 35%, and Texaco and SRI each own 32.5% of Motiva.

48. The downstream assets included in Equilon and Motiva included 12 refineries located in California, Delaware, Illinois, Kansas, Louisiana, Texas and Washington, 23 lubricant blending plants, 2 research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees.

49. Shell and Texaco did not include their marine fuels businesses in Equilon and Motiva.

50. Shell and Texaco did not include their upstream operations, such as exploration and production, in Equilon and Motiva.

51. In their agreements, the parties provided for dissolution of Equilon and Motiva by mutual consent at any time, and unilaterally by notice after five years, effective two years after notice.

52. Ownership of the Texaco and Shell trademarks was not transferred to Equilon and Motiva.

53. Equilon and Motiva market gasoline under the Shell and Texaco brand names in the Western and Eastern United States, respectively, pursuant to written license agreements with Shell and Texaco.

54. Equilon and Motiva licensed the Shell and Texaco trademarks subject to Brand Management Protocol agreements.

55. The Brand Management Protocols generally required that both the Shell brand and the Texaco brand would be preserved, that both would be treated equally and that neither brand would receive preferential treatment over the other brand.

56. After the formation of Equilon and Motiva, use and management of the Shell and Texaco brands by Equilon and Motiva were subject to the oversight of a Brand Management Council, which included representatives of Shell and Texaco. One of the functions of the Brand Management Council was to develop criteria and standards by which to measure brand performance, so as to ensure that both Shell and Texaco brands were receiving equal treatment.

57. Motiva and Equilon each have a Chief Executive Officer ("CEO").

58. Texaco and Shell agreed not to compete with Equilon and agreed not to engage in the manufacturing and marketing of certain products in the Equilon geographic area, including fuel, synthetic gasoline and electricity.

59. Texaco, Shell and SRI agreed not to compete with Motiva and agreed not to engage in the manufacturing and marketing of certain products in the Motiva geographic area, including fuel, synthetic gasoline and electricity.

60. Under the Motiva agreements, SRI retained the option of entering refining and marketing in the Western United States.

61. Since their formation, Equilon and Motiva have maintained and marketed both the Shell and Texaco brands of gasoline.

62. Prior to the formation of Equilon and Motiva, Shell, Texaco and Star separately and independently set prices for the Shell and Texaco brands through their own pricing departments. After the formation of Equilon and Motiva, the pricing was consolidated so that one person at Equilon set prices for both the Shell and Texaco brands in any given

Equilon pricing area, and one person at Motiva set prices for both brands in any given Motiva pricing area.

63. Equilon and Motiva each set prices for Shell and Texaco branded gasolines in thousands of distinct geographic trade areas throughout their respective regions of operation. Prices in each trade area are set based on conditions in that particular trade area.

64. The independent dealer operators in the Equilon and Motiva geographic areas determine, on their own, the prices to charge consumers for branded gasoline at the pump.

65. Texaco and Shell branded service station operators continue to compete for customers at the pump.

66. To some extent, the customers for the Shell and Texaco brands are different, and the marketing of the two brands is targeted at different customer segments. For example, Texaco customers tend to be more blue-collar and rural than Shell customers, who are more affluent and urban.

67. After their formation, Equilon and Motiva also eliminated the variable rent program under which Shell dealers received discounts in the form of rebates applied against station rents depending on their gasoline purchases. Previously, Shell dealers that had met specified targets for gasoline purchases received rebates against their rent, depending on the amount of gasoline purchased.

PLAINTIFFS' STATEMENT OF ADDITIONAL FACTS BELIEVED BY PLAINTIFFS TO BE UNDISPUTED AND RESPONSES BY DEFENDANTS

A. PARTIES

1. Defendant SRI is a corporate affiliate of Saudi Arabian Oil Co. ("Saudi Aramco"), which is owned by the Kingdom of Saudi Arabia. Saudi Arabia is a principal member of OPEC. SRI has been indirectly engaged in the transporting of crude oil. SRI owns an interest in Motiva Enterprises LLC ("Motiva"), which is engaged in refining, transporting, storing and marketing petroleum products, including

gasoline, in some areas of the United States. (Answer of SRI to Second Amended Complaint ("SRI Answer"), ¶¶ 13, 14.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Defendants agree to, and SRI's answer admits the first clause of the first sentence, as well as the second and third sentences. Defendants maintain that only SRI is a defendant to this action, and therefore any and all references to the Kingdom of Saudi Arabia and to OPEC are not relevant and not material.

B. TRANSACTIONS AT ISSUE

2. Effective January 1, 1998, following negotiations among the defendants that began in March of 1996, defendants Shell and Texaco formed Equilon, a combination of the Shell and Texaco refining and marketing ("downstream") operations in the Western United States. As a result of the Equilon combination, defendants eliminated competition with each other in the refining and marketing of branded gasoline in the Western United States. The combination continued to sell both the Shell and Texaco brands of gasoline, but eliminated price competition between the brands. (Declaration of Daniel R. Shulman ("Shulman Decl."), submitted herewith, Tab 2, containing Plaintiff Exhibit ("PX") 1; PX 2; PX 3; PX 4; Deposition of John Darnley ("Darnley Depo.), pp. 15-16; Deposition of Glenn Tilton ("Tilton Depo."), p. 118; Deposition of Mark Williams ("Williams Depo."), pp. 30-31; PX 274.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Defendants dispute that the formation of the joint ventures eliminated price competition between the brands. Plaintiffs have stipulated and have testified in depositions that Texaco and Shell branded service station operators continue to compete for customers at the pump. (Uncontroverted Fact No. 65).

3. Effective July 1, 1998, as the culmination of their negotiations , defendants formed Motiva, a combination of their downstream businesses in the Eastern United States. As a result of the Motiva combination, defendants eliminated competition with each other in the refining and marketing of branded gasoline in the Eastern United States. The combination continued to sell both the Shell and Texaco brands of gasoline, but eliminated price competition between the brands. (Shulman Decl., Tab 3, containing PX 5, PX 6; PX 7; PX 8; PX 9; Deposition of Larry Burch ("Burch Depo."), p. 31; Tilton Depo., p. 118; PX 275.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Defendants dispute that the formation of the joint ventures eliminated price competition between the brands. Plaintiffs have stipulated that Texaco and Shell branded service station operators continue to compete for customers at the pump. (Uncontroverted Fact No. 65).

4. Defendants have generally referred to the overall combination of Equilon, Motiva, and related service companies as "The Alliance." (Shulman Decl., Tab 4, containing Deposition of John Boles ("Boles Depo."), p. 97; Deposition of L. Wilson Berry ("Berry Depo."), pp. 5, 18, 34, 40; Burch Depo., p. 7; Tilton Depo., pp. 17, 170-71.)

Response by Defendants: Defendants admit that three Texaco representatives and one Shell representative testified that they have referred to the joint ventures as an alliance. Defendants, however, maintain that the expression "The Alliance" is not material nor relevant. Plaintiffs insist on using that expression instead of joint ventures.

C. PREALLIANCE INDUSTRY CONDITIONS

5. Prior to The Alliance, competitors in the United States gasoline refining and marketing industry included, *inter alia*, six major oil companies (Shell, Texaco, Exxon, Mobil, Chevron, and Amoco), each of which had a fairly stable market share in the range of six to eight percent. Shell, with

a market share of 8 percent, had annual revenues of $18.3 billion; Texaco, with a share of 7 percent, had annual revenues of $18 billion. (Shulman Decl., Tab 5, containing PX 25 at p. 18428, PX 50 at p. 21615, PX 88 at pp. 763, 765-66; PX 34 at p. 734.)

Response by Defendants: Defendants maintain that the facts contained above are not material or relevant because the plaintiffs have not alleged a claim subject to a rule of reason analysis. Moreover, plaintiffs do not define what the expression "fairly stable" means. Nor do they indicate, and they cannot indicate, that these market shares support market power by any of the named oil companies. Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

6. Despite defendants' dissatisfaction with their rates of return, their refining and marketing businesses were profitable prior to the formation of The Alliance. (Shulman Decl., Tab 6, containing Deposition of John Barnes ("Barnes Depo."), pp. 134-35; Williams Depo., pp. 118-19.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Defendants admit that one Shell representative and one SRI representative testified that prior to the formation of the joint ventures, Shell and Star were earning insufficient returns on investment. Defendants also have admitted that refining and marketing margins were not satisfactory. Plaintiffs provide no support for the representation that Texaco, Shell and SRI were "profitable" prior to formation or in what manner they were profitable. Defendants further object to this fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

7. Even in the absence of The Alliance, the defendants planned to implement cost reductions in order to improve competitiveness and profitability in their downstream

businesses. (Shulman Decl., Tab 7, containing Barnes Depo., pp. 36-37; PX 18; Deposition of Frank Woelfel ("Woelfel Depo."), pp. 23, 50-51.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Defendants admit that two SRI representatives testified unremarkably that prior to the formation of the joint ventures, Star had plans to reduce costs and improve efficiencies. Other deponents have testified that businesses always look to improve costs, but did not testify as plaintiffs attempt to argue that specific cost reductions were planned. Defendants further object to this fact given plaintiffs' insistence on using the non-material expression "The Alliance" instead of joint ventures.

8. The defendants believed, however, that in the absence of a combination such as The Alliance, any cost savings the defendants achieved independently would not result in a sustainable increase in profitability, and would be competed away. (Shulman Decl., Tab 8, containing PX 90; Deposition of Jim Derryberry ("Derryberry Depo."), pp. 40-41; Williams Depo., pp. 55-56; PX 58 at p. 2406; Barnes Depo., pp. 37-38.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Defendants admit that a non-defendant JP Morgan representative opined that Star's annual cost savings initiatives might not result in sustainable competitive advantages. Defendants further admit that one SRI representative testified that even if Star reduced its own costs, it could not, by itself, attain a position of leadership. Mr. Williams, a Shell representative, testified that continued investment in refineries in the early 1990s produced extremely low returns. Plaintiffs provide no additional support in the form of testimony from a Texaco representative. Plaintiffs' own expert testified that the synergies were over and above what could have been

achieved independently by the parties. Defendants further object to this fact given plaintiffs' insistence on using the non-material expression "The Alliance" instead of joint ventures.

D. THE NEGOTIATIONS LEADING TO THE ALLIANCE

9. For a number of reasons, including the desire to preserve a United States outlet for Saudi Arabian crude oil, SRI joined the discussions with Shell and Texaco, with the knowledge and consent of its parent company, Saudi Aramco. (Shulman Decl., Tab 9, containing PX 37; Woelfel Depo., pp. 51[illegible] 58; PX 43; Woelfel Depo., pp. 59-66; PX 54.)

Response by Defendants: Defendants maintain that only SRI is a defendant to this action, and therefore any and all references to Saudi Aramco are not relevant and not material. Further, SRI only joined the discussions with respect to Motiva and plaintiffs provide no support for any broader proposition.

10. As the discussions progressed in the Spring of 1996, Texaco, Shell and Star formed a "synergy team," which conducted an analysis to determine what expenditure reductions could be obtained from a combination of their downstream assets. (Shulman Decl., Tab 10, containing Berry Depo., pp. 12-15; PX 34; Berry Depo., pp. 64-65; Boles Depo., pp. 19-23; Tilton Depo., pp. 36-38.)

Response by Defendants: Defendants agree to the factual proposition so long as the word "efficiencies" is inserted before the words "expenditure reductions." Even in the face of clear document and testimony support establishing the synergy team's review of potential efficiencies and cost savings associated with the formation of the joint ventures, plaintiffs refuse to use the word "efficiencies" anywhere in the joint stipulation, thus resulting in a misleading an incomplete factual assertion.

11. In negotiating the combination, the purpose of the defendants was to increase the profitability of their refining and marketing businesses. (Shulman Decl., Tab 11, containing PX 42; Deposition of James Morgan ("Morgan Depo."), Vol. 1, pp. 89-91; PX 273 at p. 20565; Deposition of Louise Nemanich ("Nemanich Depo."), pp. 92-94; Tilton Depo., p. 70; PX 271; Woelfel Depo., p. 146.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. The purpose of discussing a potential joint venture among defendants was to analyze and determine what efficiencies and expenditure reductions could be obtained from a combination of their downstream assets.

12. From the outset of the discussions, Shell and Texaco insisted that the Shell and Texaco brands would both be preserved and separately marketed under any combination of defendants' downstream assets. Any combination would be required to market, preserve, and promote both Shell-branded gasoline and Texaco-branded gasoline. The brands themselves would not be combined. (Shulman Decl., Tab 12, containing Berry Depo., pp. 26-27; Tilton Depo., p. 26; PX 35 at p. 9014.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Plaintiffs already have stipulated, and the deposition testimony supports, that the Brand Management Protocols generally required that both the Shell brand and the Texaco brand would be preserved, that both would be treated equally and that neither brand would receive preferential treatment over the other brands. (Uncontroverted Fact No. 55).

13. The defendants believed that they would have a "first mover" advantage in obtaining regulatory approval for their combination if they combined before their competitors did so. (Shulman Decl., Tab 13, containing PX 35 at p. 9012; Berry Depo., p. 73; Williams Depo., pp. 63-65.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Defendants admit that one Texaco representative testified that the advantages of consolidation were "probably" discussed at a meeting. Defendants also admit that a Shell representative testified that it was his opinion that there were advantages to initiating a joint venture and being the first to do it. Plaintiffs provide no additional support in the form of testimony from an SRI representative. Defendants further object to the expression "first mover" as irrelevant, non-material and prejudicial.

14. From the outset of their discussions, the defendants anticipated and understood that whatever combination they formed would be subject to government regulatory review, such as by the Federal Trade Commission. (Shulman Decl., Tab 14, containing PX 58 at p. 2409; Barnes Depo., pp. 39-40; PX 72 at p. 12616; Berry Depo., p. 96; Boles Depo., p. 27; PX 88 at p. 775; Nemanich Depo., p. 81.)

Response by Defendants: Defendants readily admit that they understood that the formation of the joint ventures would be subject to FTC review. Defendants cannot agree to this proposition as a stand-alone fact, however, because plaintiffs refuse to list as uncontroverted the extent of the federal and state regulatory approval of both joint ventures, thus making this assertion misleading. (See Defendants' Uncontroverted Facts Nos. 26-28).

15. During the pre-formation analysis of the joint ventures, Texaco, Shell and SRI executed confidentiality agreements, which provided that any copies of documents or information exchanged would be returned to the producing party or discarded. (Shulman Decl., Tab 15, containing PX 335; Barnes Depo., pp. 115-17.)

Response by Defendants: Defendants admit that they signed confidentiality agreements concerning the return of copies of documents reviewed during the pre-formation analysis of the joint ventures. Defendants cannot agree to

this proposition as a stand-alone fact, however, because plaintiffs attempt to use this fact to suggest that documents were destroyed and/or not produced to the FTC, thus making this assertion misleading.

16. Pursuant to the confidentiality agreements, in the course of their discussions, defendants established data rooms as depositories for the documents that were used in their discussions. (Shulman Decl., Tab 16, containing PX 83; Barnes Depo., pp. 64-67; Berry Depo., pp. 90-91; PX 84; Boles Depo., pp. 88-93; Nemanich Depo., pp. 98-102.)

Response by Defendants: Defendants agree to the factual proposition so long as reference is made to the synergies that were analyzed by the parties at this time, and which analysis was one of the reasons for the establishment of the data room. Plaintiffs refuse to concede that the documents contained in the data rooms were used to analyze synergies, thus making this assertion misleading. (Defendant Uncontroverted Fact No. 23).

17. The documents in the data rooms were not submitted by defendants to the FTC during its review. Under the confidentiality agreements, they were either returned to the producing parties or destroyed. (Shulman Decl., Tab 17, containing Nemanich Depo., pp. 100-01; Barnes Depo., pp. 115-17.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Ms. Nemanich testified that she had no knowledge of any documents being destroyed; in fact she testified that she had no knowledge of Shell documents and had returned the keys to the room containing Texaco documents to legal counsel. Mr. Barnes also testified that he had no knowledge of any documents being destroyed. He also testified that he did not recall the language of the confidentiality agreements. Mr. Williams testified unequivocally that no original documents were destroyed. (Williams Dep. 90). Moreover, plaintiffs have no support

for any allegation that the documents in the data room were not submitted to the FTC. In fact, the companies did not place original documents in the data room and the originals remained with the parent corporations. All of these documents were subject to FTC requests.

18. During the negotiations, Saudi Aramco received reports from SRI, gave instructions to SRI, and participated in direct discussions with Shell and Texaco. (Shulman Decl., Tab 18, containing PX 11 at pp. 4511-13; PX 63 at p. 1627; PX 128; PX 133; PX 134 at pp. 3174-75, 3179; PX 159; PX 181; PX 186 at pp. 1502-04; PX 202; PX 207; PX 99; PX 100; PX 126 at p. 3598, 3601; PX 164; PX 166; PX 171; PX 175; PX 176; PX 178; PX 182; PX 183; PX 185; PX 194; PX 195; PX 204; PX 205; Barnes Depo., pp. 13-15, 69-72; Woelfel Depo., pp. 19-20.)

Response by Defendants: Defendants maintain that only SRI is a defendant to this action, and therefore any and all references to Saudi Aramco are not relevant and not material. Defendants cannot admit to this proposition to the extent that it suggests that SRI participated in any discussion unrelated to Motiva or that Saudi Aramco received reports, gave instructions or participated in discussions relating to Motiva.

19. Aramco's purpose in the formation of The Alliance was to secure a continuing outlet in the United States for Saudi Arabian crude oil. Establishing satisfactory supply agreements with The Alliance was critical for Aramco, a deal-breaker issue. (Shulman Decl., Tab 19, containing PX 37; PX 43; PX 54; PX 123 at p. 3210; PX 160 at p. 423; PX 181 at p. 1478; PX 201; Woelfel Depo., pp. 33-36; Williams Depo., pp. 138-40.)

Response by Defendants: Defendants maintain that only SRI is a defendant to this action, and therefore any and all references to Saudi Arabia are not relevant and not material. Defendants cannot agree to this proposition to the extent that it refers to establishing supply agreements with Equilon and

Motiva because plaintiffs use "Alliance" to refer to both Equilon and Motiva and the only crude supply arrangements that were ever discussed and ultimately agreed to were between SRI and Motiva alone. Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

E. THE STRUCTURE OF THE ALLIANCE

20. The formation of The Alliance did not constitute a merger. SRI, Shell, and Texaco continued as they were before the formation of The Alliance, except for the specific downstream assets contributed to The Alliance. (Shulman Decl., Tab 20, containing PX 1 at p. 6; PX 5 at p. 679.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. The documents cited by plaintiffs clearly establish that defendants have not engaged in the production, marketing and distribution of branded gasoline to retail gas stations in the United States since the formation of the joint ventures. Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

21. The defendants were competitors before The Alliance, and they continued to be competitors, except as specifically provided otherwise in written non-compete agreements, which provided generally that defendants would not compete with The Alliance, subject to certain exceptions discussed hereafter. (Shulman Dec., Tab 21, containing PX 3; PX 4; PX 7; PX 8; PX 9; Tilton Depo., pp. 160-61; Williams Depo., pp. 96-97; Berry Depo., pp. 86-87.)

Response by Defendants: Plaintiffs' factual proposition is repetitive and unnecessary in that the parties have already stipulated that Texaco and Shell agreed not to compete with Equilon and agreed not to engage in the manufacturing and marketing of certain products in the Equilon geographic area. (Uncontroverted Fact No. 58). The parties also stipulated

that Texaco, Shell and Star agreed not to compete with Motiva and agreed not to engage in the manufacturing and marketing of certain products in the Motiva geographic area. (Uncontroverted Fact No. 59). This was entirely consistent with defendants' objective to end competition between Shell and Texaco in the Western United States solely with respect to the downstream refining and marketing of gasoline (Uncontroverted Fact No. 42), and to end competition between Shell and Star in the Eastern United States solely with respect to the downstream refining and marketing of gasoline (Uncontroverted Fact No. 45). Defendants object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

22. In a number of respects, The Alliance was not a fully integrated combination of defendants' downstream operations. For example, in forming The Alliance, Shell did not contribute its Deer Park, Texas, refinery, but retained ownership of the Deer Park refinery separate and apart from The Alliance. (Shulman Decl., Tab 22, containing Berry Depo., pp. 28-30; Boles Depo., p. 61; Morgan Depo., Vol. 2, pp. 294-96; Williams Depo., p. 83.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Defendants also do not agree to the plaintiffs' conclusory factual assertion. As defendants establish, the joint ventures are full economic integrations of the partners' domestic downstream assets and operations. Shell could not contribute its partial interest in the Deer Park refinery that it co-owns with PEMEX – the Mexican national oil company – because PEMEX would not agree to that arrangement. (Defendant Uncontroverted Fact No. 44). Besides, the Deer Park refinery does not produce branded gasoline. (*Id.*). Nor are there any marketing assets affiliated with the Deer Park refinery. (*Id.*). Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

23. Likewise, Shell and Texaco did not include their chemicals businesses in The Alliance. (Shulman Decl., Tab 23, containing Berry Depo., pp. 30-31; Boles Depo., p. 78; Tilton Depo., pp. 156-57; Williams Depo., p. 83.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition for the following simple reason: Texaco did not have a chemicals business to contribute to the joint ventures. (Tilton Dep. 158). Not surprisingly, plaintiffs do not cite to this page. Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

24. Nor did Shell and Texaco include their aviation fuel businesses in The Alliance, although they permitted Equilon to engage to some extent in the aviation fuels business. (Shulman Decl., Tab 24, containing Berry Depo., pp. 29-32; Boles Depo., pp. 76-77; Morgan Depo., Vol. 1, pp. 51-54; Morgan Depo., Vol. 2, p. 203; Tilton Depo., p. 157; Williams Depo., pp. 80-83.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Defendants admit that the aviation businesses were not included in the joint ventures because they were global businesses. (Defendants' Uncontroverted Fact No. 42). Only Mr. Boles and Mr. Morgan provided testimony on Equilon's involvement with the aviation fuels business. Mr. Boles testified that he was not familiar with "the specifics" (Boles Dep. 76), while Mr. Morgan testified that the aviation business is "more of a global business" (Morgan Dep.54). Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

25. In forming The Alliance, the defendants negotiated "sole risk" provisions, which permitted them to acquire and operate refining ventures in competition with The Alliance if The Alliance companies declined to make such investments.

(Shulman Decl., Tab 25, containing Barnes Depo., pp. 57, 144-45; Berry Depo., pp. 86-87; Williams Depo., pp. 96-97.)

Response by Defendants: Defendants maintain that any reference to a sole risk provision is not relevant and not material. Furthermore, Mr. Barnes testified that sole risk marketing provisions were rejected. (Barnes Dep. 144-45). Moreover, a reading of the sole risk refining provisions indicate that the plaintiffs have mischaracterized the manner in which the provisions operate. Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

26. The defendants excluded from The Alliance all of their international refining and marketing operations, so as to limit The Alliance's operations exclusively to the United States. (Shulman Decl., Tab 26, containing Morgan Depo., Vol. 1, pp. 118-20; Tilton Depo., pp. 157-58.)

Response by Defendants: Defendants readily admit that the international and refining operations of the partners were not included in the joint ventures, which consolidated the downstream U.S. refining and marketing assets of the partners. (Defendants' Uncontroverted Fact No. 42). The inclusion of the international businesses was never considered. Defendants dispute plaintiffs' conclusory and argumentative fact. Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

27. In addition, the defendants agreed that Texaco and SRI would each have the right to acquire and operate one United States oil refinery in competition with The Alliance. (Shulman Decl., Tab 27, containing Tilton Depo., pp. 161-62; Williams Depo., pp. 143-44.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Furthermore, Mr. Tilton testified that SRI and Texaco could operate a "comparable business" to the Deer

Park refinery. Deer Park is a joint venture between Shell and Mexico and does not compete with the joint ventures. Neither Texaco nor SRI have chosen to operate a "comparable business" – Mr. Tilton makes no reference to an additional refinery in competition with the joint ventures. (Tilton Dep. 161-62). Mr. Williams could only testify that he "think[s]" the partners came to some agreement regarding participating in their own independent ventures. (Williams Dep. 144). Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

28. SRI also remained free to compete against Equilon in refining and marketing in the Western United States. (Shulman Decl., Tab 28, containing Barnes Depo., pp. 140-44; PX 100; Woelfel Depo., pp. 93-94; PX 134 at p. 3178; Woelfel Depo., p. 117.)

Response by Defendants: Defendants maintain that this factual proposition is not relevant and not material because SRI is not a partner in the Equilon joint venture. (Barnes Dep. 144).

29. Texaco initiated the standstill agreement with Shell because Texaco wanted it clearly understood that the extent of Texaco's interest in negotiations with Shell was limited to the creation of a downstream venture. (Shulman Decl., Tab 29, containing Berry Depo., p. 84; Morgan Depo., Vol. 1, pp. 145-47; Tilton Depo., pp. 22-24.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. As Mr. Morgan, Mr. Tilton and Mr. Berry all testified, Texaco negotiated for a standstill agreement because it did not want Royal Dutch Shell to make an unsolicited offer for Texaco, Inc. (Morgan Dep. 145; Tilton Dep. 22; Berry Dep. 84). Defendants admit that only the downstream marketing and refining assets were included in the joint ventures. (Defendants' Uncontroverted Facts Nos. 29, 35). Plaintiffs have stipulated to this fact as well.

(Uncontroverted Facts Nos. 48-50). Defendants further object to this proposed fact on the ground that it is not relevant and not material.

30. In order to govern Equilon and Motiva, the parties created Members Committees. The Members Committee for Equilon consisted of four representatives for Shell and three for Texaco; the Members Committee for Motiva consisted of two members each for SRI, Shell and Texaco. (Shulman Decl., Tab 30, containing PX 2, pp. 58, 72; PX 6 at p. 743; Woelfel Depo., pp. 17-19.)

Response by Defendants: Defendants agree to the factual proposition so long as the word "monitor" is used instead of "govern." (Defendants' Uncontroverted Fact No. 52). The Members Committees of Motiva and Equilon have no responsibility for or role in the day to day governing of Motiva and Equilon. (Defendants' Uncontroverted Facts Nos. 53, 55) By refusing to agree to include the full facts associated with the operation of the Members Committee, plaintiffs instead assert a misleading and incomplete fact.

31. The SRI members on the Motiva Members Committee were chosen by Aramco and were Aramco executives. (Shulman Decl., Tab 31, containing Woelfel Depo., pp. 17-19.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. The initial SRI representatives on the Motiva Members Committee were SRI's CEO and an SRI Board member. Mr. Woelfel testified unequivocally that he could not "be 100 percent sure who made that decision" to select the representatives on the Motiva Members Committee for SRI. (Woelfel Dep. 19). Defendants further maintain that only SRI is a defendant to this action, and therefore any and all references to Aramco are not relevant and not material.

32. Under the limited liability company agreements for Equilon and Motiva, "The Company Business shall be conducted by the CEO and other officers of the Company,

subject to direction by, and in accordance with policies, business plans and budgets approved by, the Members, acting by and through the Members Committee." In addition, "The Company Business shall be conducted in accordance with the Business Plan and the Annual Budget then in effect and the policies, strategies and standards established by the Members Committee." (Shulman Decl., Tab 32, containing PX 2, pp. 58, 72; PX 6 at p. 743; Woelfel Depo., pp. 17-19.)

Response by Defendants: Defendants admit that the Members Committees of Motiva and Equilon have no responsibility for or role in the day to day governing of Motiva and Equiion. (Defendants' Uncontroverted Facts Nos. 53, 55). Defendants further admit that only the CEOs of Motiva and Equilon have responsibility for the day to day operations of Motiva and Equilon. (Defendants' Uncontroverted Facts Nos. 54, 56). Mr. Woelfel only confirmed this arrangement. (Woelfel Dep. 17-19). By selective citation to the agreements underlying the joint ventures and the testimony in this case, the plaintiffs have presented a misleading "factual" presentation.

F. ALLIANCE OPERATIONS

33. At the time of its formation, The Alliance had a market share of approximately 15 percent of gasoline sales in the United States, double the size of its next largest competitor. In 39 states, The Alliance had a market share of more than 10 percent; in 15 of those states, its share exceeded 20 percent; in three states, 30 percent. On the West Coast, its share exceeded 25 percent. (Shulman Decl., Tab 33, containing PX 34 at p. 734; PX 35 at p. 9018; PX 64 at p. 2618; PX 88 at pp. 765-66.)

Response by Defendants: Defendants maintain that the joint venture market shares are not relevant and not material because the plaintiffs have not asserted a claim under the rule of reason. Defendants further object to this proposed

fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

34. Equilon and Motiva have introduced no fundamental new products. (Shulman Decl., Tab 34, containing Berry Depo., p. 48; Boles Depo., p. 36; Morgan Depo., Vol. 1, pp. 67-69; Tilton Depo., pp. 35-36.)

Response by Defendants: Plaintiffs' proposed fact is contradicted by the record. In fact, both Equilon and Motiva have introduced new products; Equilon has introduced hundreds of new products. (Defendants' Uncontroverted Facts Nos. 68-69). Plaintiff does not define what a "fundamental new" product is.

35. Both Equilon and Motiva have used a separate advertising agency for Shell branded gasoline and a separate advertising agency for Texaco branded gasoline. (Shulman Decl., Tab 35, containing Berry Depo., pp. 39-40, 114; Burch Depo., pp. 31-32; Darnley Depo., pp. 9-10; Morgan Depo., Vol. 1, pp. 39-41; Tilton Depo., pp. 29-30; Williams Depo., p. 94.)

Response by Defendants: By a selective citation to the record, plaintiffs have presented a misleading fact. Defendants note that advertising was not merged because not all of the Texaco and Shell assets worldwide were merged. Thus, there were international implications to combining the advertising function. (Burch Dep. 32; Tilton Dep. 29-30). Neither company wanted to see the value of its brand degraded in any way. (Morgan Dep. 40).

36. Within a relatively short time after their formation, Equilon and Motiva implemented a practice of charging the same price for the Shell and Texaco brands of gasoline in each of the pricing areas into which Equilon and Motiva had divided their geographic spheres of operations. (Shulman Decl., Tab 36, containing PX 336; Berry Depo., pp. 42-44, 139; Burch Depo., pp. 43-44; Darnley Depo., pp. 19-21; Morgan Depo., Vol. 1, pp. 34-35; Williams Depo., pp. 23-24.)

Response by Defendants: The parties have already stipulated that after the formation of Equilon and Motiva, the pricing was consolidated so that one person at Equilon set prices for both the Shell and Texaco brands in any given pricing area, and one person at Motiva set prices for both brands in any given Motiva pricing area. (Uncontroverted Fact No. 62). Moreover, it is irrelevant whether the pricing was the same or different for the two brands. Indeed, any decision-making or conduct as to pricing post-formation is entirely irrelevant and that plaintiffs do not claim any pre-formation agreement concerning how pricing would be handled post-formation.

37. Defendants implemented their price-fixing in conjunction with a joint program called the Strategic Marketing Initiative, which was developed by Equilon, Motiva, and related service companies as an Alliance-wide program; called for price-fixing as a means of "price optimization"; and was regularly reviewed with the Members Committees of both Equilon and Motiva. (Shulman Decl., Tab 37, containing PX 192; PX 236; PX 249; PX 251; PX 254; PX 255; PX 283; PX 284; PX 286; Berry Depo., pp. 43-44, 51-53, 112-13, 127-29, 134-37, 177-78, 182-83; Burch Depo., pp. 83, 92-93, 100-02, 126-27; Tilton Depo., pp. 147-52.)

Response by Defendants: Defendants object to plaintiffs' continued reference to the prejudicial expression "price-fixing" and deny that they ever engaged in any such conduct. Further, Defendants deny that the citations provided by plaintiffs support the factual proposition. "Price Optimization" was included as a bullet point reference in PX 192 under the heading "Fourth Quarter Priorities." (PX 192). Mr. Berry testified what SMI and price optimization meant, namely, that SMI or Strategic Marketing Initiative was an attempt by the joint ventures to put the Shell and Star marketing assets and organizations together and that price optimization referred to establishing the same price in the same marketing areas. (Berry Dep. 134-36). He also offered

that there could have been an exchange of property among wholesalers that may have influenced pricing decisions. (*Id.* at 136). Mr. Tilton testified that price optimization was the process by the joint ventures for implementing the integration of the marketing processes for the joint ventures participants. (Tilton Dep. 150-53). Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

38. From September 1, 1998, to mid-April, 1999, the price of crude oil remained in the area of roughly $12 per barrel, declining to under $10 per barrel during January and February of 1999. Equilon and Motiva, however, raised dealer tankwagon prices for Shell and Texaco branded gasoline. For example, in Los Angeles, Equilon raised its dealer tankwagon price for branded Shell and Texaco gasoline from $.62 per gallon to $1.02 per gallon in the same time period. In Portland, Oregon, and Seattle, Washington, Equilon's price went from below $.60 to above $.90 in the same time period. In Chicago, Illinois, Motiva's dealer tankwagon price went from $.55 to $.75 for Shell and Texaco branded gasoline in the same time period. Generally, such increases occurred in areas where Equilon and Motiva had larger market shares, especially on the West Coast. (Shulman Decl., Tab 38, containing PX 336; PX 337.)

Response by Defendants: Defendants maintain that any discussion of crude oil prices in relation to dealer tankwagon prices for Shell and Texaco branded gasoline is not relevant and not material because plaintiffs have not alleged a claim under the rule of reason Moreover Plaintiffs lack any factual support to establish a direct correlation and their own expert testified that he can show no causation between the change in prices and the joint ventures. In fact, plaintiffs' expert willingly changed the wording of his report during his deposition to make crystal clear that he was not opining on whether formation of the ventures in any way caused prices to rise post-formation.

39. After its formation, The Alliance eliminated expenses that had become duplicative or redundant because of the combination, such as by layoffs, elimination of positions, and closing of offices. (Shulman Decl., Tab 39, containing Berry Depo., pp. 101-02; Boles Depo., pp. 33-34, 115-18; Burch Depo., pp. 132-35; Darnley Depo., pp. 86-87.)

Response by Defendants: Defendants maintain that any discussion post-formation of the elimination of expenses in the form of layoffs or office closings is not relevant and not material. The relevant inquiry is whether the parties formed the respective joint ventures with the intention of capturing efficiencies and synergies associated with the formation. Defendants object to the implication that the efficiencies achieved related solely to eliminating duplication or redundant expenses. To be sure, the efficiency analysis shows far more than this and plaintiffs' own expert admitted that even though he is generally skeptical about efficiencies, the efficiencies here were "real." The record evidence establishes unequivocally that the joint ventures were formed only after the partners undertook an extensive analysis showing approximately $800 million in potential efficiencies and synergies from integrating gasoline production and marketing. (Uncontroverted Fact No. 39; Defendants' Uncontroverted Facts Nos. 10-21). Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

40. In addition, The Alliance avoided capital expenditures that the defendants would have made had they still remained in competition with each other. (Shulman Decl., Tab 40, containing Burch Depo., pp. 67-68; PX 222 at pp. 1919-20; Burch Depo., pp. 75-77; Tilton Depo., pp. 20, 68-70.)

Response by Defendants: Defendants maintain that whether defendants avoided certain costs post-formation is not relevant and not material in the slightest. Defendants also object to the suggestion that they no longer compete

with one another; plaintiffs have stipulated that Texaco and Shell branded service station operators continue to compete for customers at the pump. (Uncontroverted Fact No. 65). Plaintiffs provide no additional support in the form of testimony from an SRI representative. Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

41. Neither Equilon nor Motiva ever directed that any of its cost savings be passed on to consumers in the form of price reductions. (Shulman Decl., Tab 41, containing Burch Depo., pp. 136, 158-59; Darnley Depo., p. 107; Morgan Depo., Vol. 1, pp. 89-91; PX 273 at p. 20565; Nemanich Depo., pp. 93-94.)

Response by Defendants: Plaintiffs' proposed fact is contradicted by the record. Mr. Morgan, contrary to plaintiffs' representation, testified that "clearly the competitive – competitive marketplace would require us to pass through some of those savings." (Morgan Dep. 93). Additionally, Ms. Nemanich testified that the $800 million "would fall to the bottom line as savings." (Nemanich Dep. 93). Defendants maintain that whether the four named deponents ever overtly "directed" that any of the cost saving associated with the formation of the joint ventures be passed on to consumers in the form of price reductions in no way equates to whether the cost savings were eventually passed on. Of course they were. In fact, there were in excess of $100 million of combined savings across Motiva and Equilon. (Darnley Dep. 108-09). Plaintiffs' representation to the contrary is disingenuous at best and blatantly misleading at worst.

42. The Equilon Members Committee has met six times per year; the Motiva Members Committee has met four times per year, including two or three meetings in Saudi Arabia. The representatives of defendants on the Equilon and Motiva Members Committees have had separate designated staffs at

their own companies, which receive briefings from Equilon and Motiva prior to Members Committee meetings, so as to prepare the members for the upcoming meetings. (Shulman Decl., Tab 42, containing Morgan Depo., Vol. 1, p. 11; Berry Depo., pp. 48, 150-51; PX 221; PX 224; PX 231 at pp. 3958-59; Berry Depo., p. 175; PX 253 at pp. 4054-56; Berry Depo., pp. 178-79; Tilton Depo., pp. 16-17, 168-70; Woelfel Depo., pp. 141-42.)

Response by Defendants: As an initial matter, defendants object to plaintiffs' use of a long string cite as support for all facts contained in the proposition. Defendants deny that the citations provided by plaintiffs support each factual proposition put forth by plaintiff. For example, Mr. Morgan on page 11 does not discuss the number of times the Motiva Members Committee met, the location of Members Committee meetings, the purpose of the meetings, or the role of support staff in advance of the meetings. He merely testified that he "believed" the Equilon Board of Directors met six times a year. (Morgan Dep. 11). Defendants maintain that whether two or three of those meetings took place in Saudi Arabia is not relevant and not material. Defendants further maintain that whether Equilon and Motiva make use of staffs to prepare for meetings is not relevant and not material in the slightest.

43. During 1999, Motiva closed 200 service station sites. Equilon has sold 350 to 400 gasoline stations since its formation. (Shulman Decl., Tab 43, containing Burch Depo., pp. 94, 96; Darnley Depo., p. 55.)

Response by Defendants: Defendants deny that the citations provided by plaintiffs support the factual proposition. Mr. Burch testified that he "believe[d]" service stations were closed and could only "guess" as to the correct number of stations. (Burch Dep. 94, 96). Likewise, Mr. Darnley testified that he did not know how many gasoline stations were closed and could only offer an approximation. (Darnley Dep. 55). In any event, defendants maintain that

any discussion post-formation of the reduction in the number of certain service stations is not relevant and not material. The relevant inquiry is whether Texaco, Shell and SRI formed the joint ventures with the intention of capturing efficiencies and synergies associated with the formation. The record evidence establishes unequivocally that the joint ventures were formed only after the partners undertook an extensive analysis showing approximately $800 million in potential efficiencies and synergies from integrating gasoline production and marketing. (Uncontroverted Fact No. 39; Defendants' Uncontroverted Facts Nos. 10-21).

44. At present, because of its agreement to be acquired by Chevron, Texaco is in discussions with Shell and SRI with regard to the dissolution of The Alliance, or the sale of Texaco's interest in The Alliance. (Shulman Decl., Tab 44, containing Tilton Depo., pp. 174[illegible] 76.)

Response by Defendants: Defendants maintain that whether Texaco is in discussions with Shell and SRI with regard to the dissolution of the joint ventures is not relevant and not material in the slightest. Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

G. PRICE-FIXING

45. No efficiencies, cost savings, or synergies have resulted from Equilon's and Motiva's fixing the prices for Shell and Texaco branded gasolines. Whatever cost savings have resulted from The Alliance have been entirely unrelated to The Alliance's fixing prices for Shell and Texaco gasolines. (Shulman Decl., Tab 45, containing Deposition of Peter Bijur ("Bijur Depo."), pp. 78, 81; Berry Depo., pp. 44-45; Burch Depo., pp. 42-43; Darnley Depo., p. 41; Tilton Depo., p. 93; Williams Depo., pp. 26-27; Woelfel Depo., p. 44.)

Response by Defendants: Defendants object to plaintiffs' continued reference to the prejudicial expression and legal

conclusion "price-fixing" and deny that they ever engaged in any such conduct. Defendants further deny that the citations provided by plaintiffs support the factual proposition. Mr. Bijur testified that discussions of pricing did not take place and in any event, the parties never would have discussed pricing "because the market is so competitive that we could never take that into account in any calculation." (Bijur Dep. 81). Mr. Bijur offered that the synergies and cost savings associated with the formation of the joint ventures centered on consolidation of assets. (*Id.*). Plaintiffs have already stipulated that the joint ventures consolidated the price setting function after formation. (Uncontroverted Fact No. 62). Not surprisingly, the parties did not and could not anticipate cost savings associated with setting the same prices for Shell and Texaco branded gasoline pre-formation. Mr. Williams did not have an opinion on the issue. (Williams Dep. 26-27). Moreover, plaintiffs' questioning whether charging the same prices for Shell and Texaco gasoline resulted in efficiencies is a question that is not probative of whether efficiencies resulted from the marketing functions of the parents being integrated into the joint ventures. The record evidence establishes unequivocally that the joint ventures were formed only after the partners undertook an extensive analysis showing approximately $800 million in potential efficiencies and synergies from integrating gasoline production and marketing. (Uncontroverted Fact No. 39; Defendants' Uncontroverted Facts Nos. 10-21). Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

46. Because each has a different package of additives, Shell and Texaco branded gasolines are separate and distinct products. (Shulman Decl., Tab 46, containing Berry Depo., pp. 35-37; Burch Depo., p. 29; Darnley Depo., pp. 10-11; Tilton Depo., pp. 30-31; Williams Depo., p. 22; Woelfel Depo., p. 43.)

Response by Defendants: The parties have stipulated that to some extent, the customers for Shell and Texaco are different, and the marketing of the two brands is targeted at different customer segments. (Uncontroverted Fact No. 66). Indeed, defendants admit that witnesses have testified that the two brands to some extent have different customer bases and have different additive packages. Witnesses also have testified to their understanding that under the antitrust laws, the two brands are the same product such that they are required to be priced the same by, respectively, Equilon and Motiva, to the same customers (dealers) in the same markets. Defendants deny that the two brands are different in any manner relevant to the analysis required by law herein.

47. Inasmuch as the claimed cost savings, synergies, and efficiencies of The Alliance were entirely unrelated to The Alliance's price-fixing, all of such claimed savings could have been achieved without The Alliance's fixing the prices for Shell and Texaco gasoline. (Shulman Decl., Tab 47, containing Bijur Depo., pp. 78, 81; Boles Depo., pp. 166-67.)

Response by Defendants: Defendants object to plaintiffs' continued reference to the prejudicial expression and legal conclusion "price-fixing" and deny that they ever engaged in any such conduct. Defendants further deny that the citations provided by plaintiffs support the factual proposition. In fact, plaintiffs' proposed fact is nothing more than pure speculation. Again, Mr. Bijur testified that the parties never would have discussed pricing "because the market is so competitive that we could never take that into account in any calculation." (Bijur Dep. 81). Mr. Bijur offered that the synergies and cost savings associated with the formation of the joint ventures centered on consolidation of assets. (*Id.*). Plaintiffs have already stipulated that the joint ventures made the decision to consolidate the price setting function after formation. (Uncontroverted Fact No. 62). Not surprisingly, the parties did not and could not anticipate cost savings associated with setting the same prices for Shell and Texaco branded gasoline pre-formation.

Moreover, plaintiffs' questioning whether charging the same prices for Shell and Texaco gasoline resulted in efficiencies is a question that is not probative of whether efficiencies resulted from the marketing functions of the parents being integrated into the joint ventures. The record evidence establishes unequivocally that the joint ventures were formed only after the partners undertook an extensive analysis showing approximately $800 million in potential efficiencies and synergies from integrating gasoline production and marketing. (Uncontroverted Fact No. 39; Defendants' Uncontroverted Facts Nos. 10-21). Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

48. As shown in paragraph 36, *supra*, after forming The Alliance, defendants were able to raise the prices of Shell and Texaco branded gasoline during a time when crude oil prices were falling to historic lows. (Shulman Decl., Tab 48, containing PX 336; PX 337; Tilton Depo., pp. 121-23.)

Response by Defendants: Again, defendants maintain that any discussion of crude oil prices in relation to the prices of Shell and Texaco branded gasoline is not relevant and not material. Plaintiffs lack any factual support to establish a direct correlation. Moreover, defendants further deny that Mr. Tilton's testimony supports the factual proposition. In fact, Mr. Tilton says nothing about an increase in the price of either Shell or Texaco branded gasoline. (Tilton Dep. 121-23). Defendants further object to this proposed fact given plaintiff's insistence on using the non-material expression "The Alliance" instead of joint ventures.

49. In the second quarter of 1999, crude prices began to increase when OPEC raised prices by agreeing to a reduction in output. The Kingdom of Saudi Arabia, which owns Saudi Aramco and SRI, is a principal member of OPEC. At the time of the OPEC action in the second quarter of 1999, Saudi Aramco, through SRI, had in place a contractual

arrangement to supply Motiva with 450,000 barrels a day of crude oil, more than half of Motiva's requirements. (Shulman Decl., Tab 49, containing SRI Answer, ¶¶ 13, 14; Tilton Depo., pp. 121-23; Berry Depo., pp. 20-24; Burch Depo., p. 97.)

Response by Defendants: Once again, defendants maintain that any discussion of crude oil prices is not relevant and not material. Additionally, the record citations do not support the assertion in the first sentence. Defendants further maintain that only SRI is a defendant to this action, and therefore any and all references to the Kingdom of Saudi Arabia, Saudi Aramco and to OPEC are not relevant and not material. Defendants also object to this factual proposition as repetitive of plaintiffs' "Uncontroverted" Fact No. 1.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter of this action.

2. In the formation and operation of Equilon and Motiva, defendants have agreed, combined, and conspired to fix, raise, peg, and stabilize the prices for branded Shell and Texaco gasoline.

3. Equilon and Motiva are not sufficiently integrated ventures to avoid application of the *per se* rule against price-fixing or the prohibition of price-fixing under the quick look rule of reason.

4. The alleged efficiencies of Equilon and Motiva were not conceived by defendants with the intent of creating a benefit for consumers, and there is no evidence that any of such claimed efficiencies have been of benefit to consumers, or are likely to be so.

5. The price-fixing of branded Shell and Texaco gasoline implemented by defendants through Equilon and Motiva is wholly unrelated to any claimed efficiencies of defendants' formation or operation of The Alliance, and therefore cannot avoid application of the *per se* rule against price-fixing or the

prohibition of price-fixing under the quick look rule of reason.

6. Defendants' price-fixing of branded Shell and Texaco gasoline through Equilon and Motiva is a naked restraint of trade, and is not ancillary to the formation or operation of The Alliance.

7. Defendants' fixing of prices for branded Shell and Texaco gasoline through Equilon and Motiva is a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

8. Defendants' fixing of prices for branded Shell and Texaco gasoline through Equilon and Motiva is a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, under the quick look rule of reason.

PROPOSED JUDGMENT

Plaintiffs above-named having moved for partial summary judgment on the issue of whether defendants above-named have violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1; and the Court having reviewed the uncontroverted facts of record, and having determined that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law in accordance with their motion; it is hereby ORDERED, ADJUDGED, and DECREED that defendants have violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, by acting in concert to raise, fix, peg, and stabilize the prices of Shell and Texaco gasoline through the formation and operation of Motiva Enterprises LLC and Equilon Enterprises LLC.

DEFENDANTS' STATEMENT OF ADDITIONAL FACTS BELIEVED BY DEFENDANTS TO BE UNDISPUTED AND RESPONSES BY PLAINTIFFS

1. The downstream assets of Shell and Texaco refer to those assets used in the refining, marketing, transportation and lubricants businesses. (Tab 9, Morgan Dep. 125-26, 448; Tab 8, Leffler Dep. 145).[2] Downstream assets are not used in the exploration or production of oil. (Tab 9, Morgan Dep. 307, 449-50; Tab 8, Leffler Dep. 145).

Plaintiffs' Response: Plaintiffs believe that this is a matter of definition over which industry experts may differ, specifically as to whether transportation of unrefined crude oil is a part of the upstream or downstream business. Plaintiffs also do not consider this fact to be material to the issues presented to the Court for decision.

2. SRI was never engaged in the business of refining or marketing gasoline at either the wholesale or retail level, except through indirectly ownership of its equity interest in Star (prior to July 1998) and Motiva (since July 1998). (Tab 13, Woelfel Dep. 7-10; Tab 2, Barnes Dep. 9-11; Tab 11, Tilton Dep. 162).

Plaintiffs' Response: The record citations do not support the statement of fact. Plaintiffs know of no competent evidence in the record to support this statement.

3. Prior to the formation of the joint ventures, Shell, Texaco and Star were experiencing depressed margins, low rates of return and inadequate profits in their refining and marketing operations and, as a result, were looking to reduce costs and to maximize efficiencies. (Tab 2, Barnes Dep. 33-34; Tab 5, Boles Dep. 120; Tab 9, Morgan Dep. 89, 123-24, 398, 400, 404, 420-21; Tab 11, Tilton Dep. 67-70; Tab 4,

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[2] The exhibits attached are not attached directly to the pleading pursuant to L.R. 3.6.1 because of the significant volume of documents.

Bijur Dep. 38, 147, 228, 253-54; Tab 14, TXDAG 0000763; Tab 15, TXDAG 0000355; Tab 16, SHDAG 0022217-47).

Plaintiffs' Response: This statement is argumentative. Plaintiffs agree only that Shell and Texaco thought their returns were inadequate. Plaintiffs also do not accept that reduction of costs is the same as efficiencies.

4. Before Shell approached Texaco with this proposal, Texaco had considered collaboration with other oil companies to achieve efficiencies and remain competitive. The leading company under consideration was Chevron. (Tab 11, Tilton Dep. 111; Tab 4, Bijur Dep. 32-33; Tab 17, EQDAG 0020551; Tab 18, EQDAG 0020662).

Plaintiffs' Response: The record citations do not support the statement, and the witnesses lack first-hand knowledge or foundation sufficient to support the statement.

5. Texaco analyzed and compared the potential synergies and cost efficiencies associated with a possible Shell or Chevron collaboration. (Tab 18, EQDAG 0020662-64).

Plaintiffs' Response: See response to Paragraph Number 4. Also, the use of the terms synergies and efficiencies is argumentative.

6. Texaco believed that it would achieve greater synergies by forming a joint venture with Shell instead of with Chevron. These synergies included marketing efficiencies, increased trading opportunities, and greater cash flow and earnings. (Tab 17, EQDAG 0020552; Tab 18, EQDAG 0020662-64).

Plaintiffs' Response: The terms synergies and efficiencies are argumentative. As a matter of law, such claimed synergies or efficiencies are not material to the issue of whether defendants' combination and price-fixing violate section 1. *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 580 (1967); *RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979). Such claimed synergies and efficiencies are even more irrelevant in the light of the undisputed testimony that

no such cost savings were ever passed on to consumers in the form of lower prices. (Shulman Decl. Tab 41.)

7. Shell had independently conducted a similar analysis in considering potential joint ventures with various companies, including Amoco. (Tab 9, Morgan Dep. 129; Tab 19, SH-DAG 004425-506; Tab 20, SH-DAG 006466-73; Tab 21, SH-DAG 19010-13; Tab 22, SH-DAG 18723-815; Tab 23, SH-DAG 1266). Shell determined that there were greater cost savings opportunities with Texaco due to the geographic distribution of the assets of both companies. (Tab 12, Williams Dep. 69-70; Tab 9, Morgan Dep. 129-30; Tab 19, SH-DAG 004442-51).

Plaintiffs' Response: See response to Paragraph Number 6, *supra*.

8. After determining that a combination of certain assets with Shell promised significant synergy potential, Texaco responded positively to Shell's proposal to explore a joint venture. (Tab 9, Morgan Dep. 155-57; Tab 11, Tilton Dep. 17-21.)

Plaintiffs' Response: The record citations do not support the statement. Texaco responded positively to Shell's overtures without knowing what alleged synergies were possible.

9. As the discussions relating to the formation of the joint ventures progressed in the Spring of 1996, Texaco, Shell and Star formed a "synergy team," which conducted an analysis to determine what efficiencies and expenditure reductions could be obtained from a venture of their downstream assets. Legal counsel supervised the synergy meetings. (Tab 3, Berry Dep. 14-15; Tab 5, Boles Dep. 21-23; Tab 9, Morgan Dep. 155-56, 167-68; Tab 24, TXDAG 0000728).

Plaintiffs' Response: The record citations do not support the statement that legal counsel supervised the synergy meetings.

10. The synergy team did not share or consider individual company future plans in analyzing the potential efficiencies. (Tab 25, EQDAG 0012317).

Plaintiffs' Response: The record citation does not support the statement, which is also inconsistent with stipulated facts 37 and 38, *supra*.

11. The synergy team concluded that synergies could be obtained in the areas of Marketing, Trading and Transportation, Refining, Lubricants, and Support Services. (Tab 24, TXDAG 0000730; Tab 15, TXDAG 0000374; Tab 14, TXDAG 0000761; Tab 25, EQDAG 0012321, 12329, 12339, 12344, 12347, and 12351). Among the potential synergies were cost efficiencies obtained from the elimination of overhead and duplication of effort, as well as via a sharing of technology and operating practices. (Tab 3, Berry Dep. 16-17; Tab 5, Boles Dep. 33-34; Tab 9, Morgan Dep. 422-23, 425).

Plaintiffs' Response: See response to Paragraph Number 6, *supra*.

12. It was not believed that Shell, Texaco or Star could achieve the approximately $800 million in potential synergies on its own. (Tab 26, SRI 002412; Tab 27, SRI 005072; Tab 28, EQDAG 0007914-947).

Plaintiffs' Response: See response to Paragraph Number 6, *supra*. Also, evidence in the record suggests both that the $800 million was overstated and that the defendants in fact could have achieved substantial portions of the estimated cost savings on their own. (Shulman Decl. Tab 50, containing PX 89; *see also* Shulman Decl. Tab 7.)

13. The breakdown of the anticipated efficiencies by function was as follows:

Activity	Equilon	Motiva	Total
Transportation & Trading	225	none	225

Lubes, R & D	80	none	80
Refining	141	94	235
Marketing	68	90	158
Support Services	48	57	105
Total	562	241	803

(Tab 29, at SRI 4994; Tab 25, EQDAG 0012321; see generally Tab 26, PX 58; Tab 15, PX 111; Tab 30, PX 252; Tab 31, PX 258; Tab 32, PX 266; Tab 34, PX 329; Tab 2, Barnes Dep. 30; Tab 3, Berry Dep. 101-102; Tab 11, Tilton Dep. 93; Tab 13, Woelfel Dep. 113-115; Tab 5, Boles Dep. 26-27, 60).

Plaintiffs' Response: See responses to Paragraph Numbers 6 and 12, *supra*. In addition, prior to forming The Alliance, the defendants never intended that any of their so-called synergies or efficiencies would ever be passed along to consumers. Rather, defendants intended and anticipated that all cost savings achieved by their combination would be realized as increased profits going directly to the bottom line. (Shulman Decl. Tab 11.)

14. Among others, the synergy team identified the following opportunities for refining: consolidating Anacortes operations; reducing investment at Bakersfield refinery; sharing best practices; better purchasing for catalysts and chemicals; and savings on technical support. (Tab 25, EQDAG 0012329, 0012355-69; Tab 19, SH-DAG 004446).

Plaintiffs' Response: See responses to Paragraph Numbers 6, 12, 13, *supra*.

15. Among others, the synergy team identified the following opportunities for transportation and trading: consolidation of pipeline management, trucking operations and supply, and optimization of pipelines and trading. (Tab 35, SH-DAG005127-36).

Plaintiffs' Response: See responses to Paragraph Numbers 6, 12, 13, *supra*.

16. Among others, the synergy team identified synergies in the area of support services from consolidation, adopting best practices and economies of scale. (Tab 35, SH-DAG005137-38; Tab 17, EQDAG 0020552).

Plaintiffs' Response: See responses to Paragraph Numbers 6, 12, 13, *supra.*

17. The synergy team also identified the following opportunities for marketing: organization consolidation, greater leverage in vendor sourcing and procurement, combined credit card processing, network optimization and brand growth, advertising sourcing and sales promotion, more cost effective gasoline additive strategy and elimination of redundant research and development. (Tab 25, EQDAG 0012333-34).

Plaintiffs' Response: See responses to Paragraph Numbers 6, 12, 13, *supra.*

18. The full extent of the potential synergies in refining and marketing could not be analyzed prior to the closing of the joint venture because of antitrust considerations. (Tab 11, Tilton Dep. 93-94; Tab 6, Burch Dep. 90; Tab 17, EQDAG 0020552; Tab 36, SH-DAG 019401; Tab 37, SRI 005409).

Plaintiffs' Response: See responses to Paragraph Numbers 6, 12, 13, *supra.* In addition, the record citations do not support this statement. In fact, they put in doubt the underlying validity of the alleged estimated synergies, by showing that the persons on the synergy teams were not actually involved in refining and marketing.

19. The determination of the efficiencies was based on the complete, integrated refining and marketing operations being placed in the joint ventures. (Tab 9, Morgan Dep. 450, 453).

Plaintiffs' Response: See responses to Paragraph Number 6, 12, 13, 18, *supra.* This is an argumentative and inaccurate statement, inasmuch as The Alliance was not completely integrated. (Joint Facts Stip. ¶¶ 49-56; Shulman Decl. Tabs

20-32.) Finally, the testimony cited does not support the statement.

20. After the June, 1996 synergy team analysis and prior to the formation of the joint ventures, various committees and sub-committees were formed to identify and quantify additional synergies and cost efficiencies. (Tab 3, Berry Dep. 115).

Plaintiffs' Response: See responses to Paragraph Numbers 6, 12, 13, 18, *supra*. Also, the testimony cited does not support the statement, other than to establish that subteams were formed.

21. In forming the joint ventures, Texaco, Shell and Star intended, *inter alia*, to increase profitability, improve margins, decrease costs and obtain efficiencies and synergies in their refining and marketing businesses. (Tab 38, PX 42; Tab 17, PX 273; Tab 9, Morgan Dep. 89-91; Tab 10, Nemanich Dep. 92-93; Tab 11, Tilton Dep. 70; Tab 13, Woelfel Dep. 146).

Plaintiffs' Response: See response to Paragraph Numbers 6, 12, 13, 18, *supra*. In particular, see Shulman Decl. Tab 11, which establishes the intent of defendants not to pass any cost savings to consumers.

22. During the pre-formation analysis of the joint ventures, Texaco, Shell and SRI executed confidentiality agreements, which provided that any copies of documents or information exchanged would be returned to the producing party or discarded. The confidentiality agreements were established to insulate the work of the negotiating team from the parent companies' ongoing operations. (Tab 2, Barnes Dep. 116-17; Tab 12, Williams Dep. 86-87).

Plaintiffs' Response: The Barnes testimony cited does not support the statement, and in fact demonstrates serious credibility questions underlying Mr. Barnes' testimony. Further, the nature and extent of information exchanged and the level of executives involved in the negotiations contradict the assertion that "the confidentiality agreements

were established to insulate the work of the negotiating team from the parent companies' ongoing operations." (Joint Facts Stip. ¶¶ 37-38; Shulman Decl. Tab 18.)

23. Pursuant to the confidentiality agreements and prior to the exchange of information to analyze synergies, Texaco, Shell and SRI established separate data rooms as depositories for the documents that were used to analyze synergies and undertake the necessary due diligence. (Tab 39, SRI 002520-21; Tab 2, Barnes Dep. 64-67; Tab 3, Berry Dep. 90-91; Tab 5, Boles Dep. 90-92; Tab 10, Nemanich Dep. 98-100; Tab 12, Williams Dep. 89).

Plaintiffs' Response: This statement is argumentative with its references to synergies and undertaking due diligence.

24. Documents exchanged prior to the formation of the joint ventures were kept shielded from the parties' employees in general and particularly from any employees with responsibility for pricing of products and operations. This was consistent with the parent corporations' efforts to prevent pre-formation disclosure of competitively sensitive information to employees not involved with the synergy team. (Tab 2, Barnes Dep. 65; Tab 6, Burch Dep. 90; Tab 11, Tilton Dep. 93-94; Tab 34, JPM 0287).

Plaintiffs' Response: This statement is argumentative. The record citations do not support the statement. The work of the synergy team was also shared with top level executives of all three defendants who did have responsibility for operations. (Shulman Decl. Tabs 11, 18.)

25. The parties did not discuss what price the joint ventures would charge for gasoline upon or after formation. (Tab 5, Boles Dep. 28; Tab 12, Williams Dep. 25; Tab 11, Tilton Dep. 33; Tab 4, Bijur Dep. 81; Tab 9, Morgan Dep. 167; Tab 2, Barnes Dep. 24-25).

Plaintiffs' Response: This statement is incomplete and misleading. The defendants clearly knew that discussions of pricing would be illegal in violation of the antitrust laws. (Shulman Decl. Tab 37.) Nonetheless, shortly after the

formation of The Alliance, the defendants in fact fixed prices (Joint Facts Stip. ¶ 62; Shulman Decl. Tabs 36-38) – evidence that this was defendants' intent prior to combining to form The Alliance.

26. Prior to their formation the Equilon and Motiva joint ventures were reviewed and allowed to proceed by the United States Federal Trade Commission ("FTC") and investigated and allowed to proceed by the Attorneys General of California, Washington, Oregon and Hawaii. (Tab 41, Decision and Order of the Federal Trade Commission, *In the Matter of Shell Oil Company and Texaco Inc.*, No. 971-0026 (Federal Trade Commission, April 28, 1998); Tab 42, Consent Decree dated March 9, 1993, *California v. Shell Oil Corp.*, Case No. CV-97-9356-IH (C.D. Cal); Tab 43, Final Judgment and Consent Decree dated April 8, 1998, *Hawaii v. Texaco Inc.*, Civ Case No. 97-01633-HG (D. Haw.); Tab 44, Consent Decree dated December 19, 1997, *Washington & Oregon v. Texaco Inc.*, Case No. C97-1980-WD (W.D. Wash.); Morgan Dep. 333.).

Plaintiffs' Response: This statement is immaterial and inadmissible with regard to the issues before the Court as a matter of law. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 227-27 (1940); *Allied Signal, Inc. v. BF Goodrich Co.*, 183 F.3d 568 (7th Cir. 1999). There is also evidence that although anticipating regulatory review from the outset, defendants destroyed or withheld from production relevant documents in their data rooms sought by the government. (Shulman Decl. Tabs 14-17.)

27. In order for the ventures to proceed, Texaco and Shell entered into a consent decree with the FTC in which the parties agreed to divest certain refineries, light products pipelines, terminals and gas stations. They also were required to enter into a long-term supply agreement concerning a crude oil pipeline and were required to give

certain distributors an opportunity to rebrand over a period of months without penalty. (Tab 9, Morgan Dep. 333; Tab 41, Decision and Order of the Federal Trade Commission, In the matter of Shell Oil Company and Texaco Inc., No. 971-0026 (Federal Trade Commission April 28, 1998).

Plaintiffs' Response: See response to Paragraph Number 26, *supra*.

28. Like the FTC, the state governments cleared the formations, but required consent decrees providing for some divestitures in local markets and at various levels of Texaco's and Shell's refining and marketing businesses, in order to ensure that competition in certain geographic and product markets would be maintained. (Tab 42, *State of California v. Shell Oil Co. and Texaco Inc.*, No. CV-97-9356-IH (C.D. Cal. March 10, 1998); Tab 44, *State of Washington and State of Oregon v. Texaco Inc. and Shell Oil Co.*, No. C97-1980WD (W.D. Wash. Dec. 19, 1997; Tab 43, *State of Hawaii v. Texaco Inc. and Shell Oil Co.*, (D. Haw.).

Plaintiffs' Response: See response to Paragraph Number 26, *supra*.

29. Effective January 1, 1998, following FTC approval, Texaco and Shell formed Equilon, a joint venture that combined their Western United States downstream gasoline refining and marketing assets and operations. (Tab 45, Equilon Master Agreement, D000001-38; Tab 46, Equilon LLC Agreement, D000039-110; Tab 9, Morgan Dep. 25-26).

Plaintiffs' Response: The reference to FTC approval is immaterial and inadmissible. See response to Paragraph Number 26, *supra*.

30. Under the terms of the Equilon formation agreements, Texaco and Shell agreed to share the risks and losses associated with the joint venture. (Tab 45, Equilon Master Agreement, D000001-38; Tab 46, Equilon LLC Agreement, D000039-110; Tab 8, Leffler Dep. 36).

Plaintiffs' Response: This statement is argumentative in its use of the term joint venture. Equilon is a limited liability company. Defendants' use of the term "joint venture" is an attempt to invest legal significance in a term that has none under the antitrust laws. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951).

31. Retail gasoline dealers such as plaintiffs are permitted to market gasoline in specified locations in the Western United States under either the Shell or Texaco brand name pursuant to the terms of written dealer franchise agreements with Equilon. (Tab 47, Complaint ¶¶ 11-12; Tab 48, Plaintiffs' Documents 000019-34; Tab 49, 000806-22; Tab 50, 000953-65; Tab 51, 0001105-19; Tab 52, 001277-93; Tab 53, 001440-56; Tab 54, 001754-73; Tab 55, 001822-37; Tab 56, 002096-112; Tab 57, 002623-40; Tab 58, 002659-73; Tab 59, 002811-25; Tab 60, 003091-107; Tab 61, 003175-91; Tab 62, 003995-4011; Tab 63, 004103-119; Tab 64, 004310-24; Tab 65, 004502-18; Tab 66, 004882-96; Tab 67, 005492-5507; Tab 68, 005770-86).

Plaintiffs' Response: This statement is incomplete and misleading. Rights of gasoline dealers such as plaintiffs are defined not just by written dealer franchise agreements, but by other applicable laws, including Section 1 of the Sherman Antitrust Act.

32. At the time of the formation of Equilon, and pursuant, *inter alia*, to the Equilon Asset Transfer and Liability Assumption Agreements, Shell and Texaco transferred to Equilon their interests in all service stations that they previously owned in the Western United States, including both leased stations and stations that they owned and operated directly. (Tab 69, D000111-536 (Asset Transfer Agreement); Tab 47, Second Amended Complaint ¶¶ 47, 77; Tab 70, PX 13).

Plaintiffs' Response: This is a legal conclusion. Shell and Texaco did not transfer to Equilon their interests in the Shell and Texaco brands. (Joint Facts Stip. ¶¶ 53-56.)

33. Since the formation of Equilon and under the terms of the Equilon formation agreements, Shell and Texaco have exited the downstream refining and marketing of gasoline in the Western United States; they do not sell or market branded gasoline in this region on either the wholesale or retail level, and they do not own, lease or operate any retail gasoline outlets in this region. (Tab 45, Equilon Master Agreement, D000001-38; Tab 46, Equilon LLC Agreement, D000039-110); Tab 69, D000111-0536; Tab 71, PX3; Tab 72, PX4; Tab 47, Second Amended Complaint ¶ 47).

Plaintiffs' Response: This statement is not accurate. (Joint Facts Stip. ¶¶ 49-56; Shulman Decl. Tabs 20-32.)

34. SRI does not own any interest in Equilon and was not involved in its formation. (Tab 45, PX 1; Tab 46, PX 2). SRI never sold or marketed gasoline in the Western United States (or anywhere else) and it never owned, leased or operated any retail gasoline outlets in this area (or anywhere else). (Tab 13, Woelfel Dep. 7-10; Tab 2, Barnes Dep. 9-11).

Plaintiffs' Response: The deposition testimony cited does not support the statement. In addition, the statement is false. Although SRI does not own any interest in Equilon, SRI was involved in the formation of Equilon, as both SRI and Saudi Aramco were involved from the outset in the overall negotiations leading to the formation of The Alliance, of which Equilon was one part. The negotiations for Equilon and Motiva were not separate and discrete, but were part of a single overall negotiation forming The Alliance, in which SRI and Saudi Aramco participated. (Shulman Decl. Tabs 4, 9, 10, 18, 19.) In the operations of The Alliance, defendants implemented their price-fixing as part of the Strategic Marketing Initiative, an Alliance-wide program. (Shulman Decl. Tab 37.)

35. Effective July 1, 1998, following FTC approval, Shell, Texaco and SRI formed Motiva, a joint venture that combined their Eastern United States downstream gasoline

refining and marketing businesses. (Tab 73, Motiva Master Agreement, D000674-709; Tab 74, Motiva LLC Agreement, D000710-789). Motiva included all of the Eastern United States downstream gasoline refining and marketing assets of Shell and Texaco and SRI through Star. (*Id.*; Tab 9, Morgan Dep. 26; Tab 15, TXDAG 0000366).

Plaintiffs' Response: See Response to Paragraph Number 29, *supra.*

36. Retail gasoline dealers are permitted to market gasoline in specified locations in the Eastern United States under either the Shell or Texaco brand name pursuant to the terms of written dealer franchise agreements with Motiva. (Tab 47, Complaint ¶¶ 11-12).

Plaintiffs' Response: See Response to Paragraph Number 31, *supra.*

37. At the time of the formation of Motiva, and pursuant, *inter alia*, to the Motiva Asset Transfer and Liability Assumption Agreements, Shell and Star transferred to Motiva their interests in all service stations that they previously owned in the Eastern United States, including both leased stations and stations that they owned and operated directly. (Tab 75, D000790-1082; Tab 47, Second Amended Complain ¶ 57).

Plaintiffs' Response: See Response to Paragraph Number 32, *supra.*

38. Since the formation of Motiva and under the terms of the Motiva formation agreements, Shell and Texaco have exited the downstream refining and marketing of gasoline in the Eastern United States; they do not sell or market branded gasoline in this region on either the wholesale or retail level, and they do not own, lease or operate any retail gasoline outlets in this region. (Tab 73, Motiva Master Agreement, D000674-709; Tab 74, Motiva LLC Agreement, D000710-789; Tab 75, D000790-1082; Tab 47, Second Amended Complaint ¶ 57).

Plaintiffs' Response: See Response to Paragraph Number 33, *supra.*

39. Apart from its interests in Star and Motiva, SRI has never been involved in the refining or marketing of gasoline in the Eastern United States (or anywhere else), and it has never owned, leased or operated any gasoline stations in the Eastern United States (or anywhere else). (Tab 13, Woelfel Dep. 7-10; Tab 2, Barnes Dep. 9-11).

Plaintiffs' Response: See Response to Paragraph Number 34, *supra.*

40. The joint ventures provided Texaco, Shell and SRI with access to complementary strengths of the other members, which offered the opportunity for future growth. (Tab 11, Tilton Dep. 112-13; Tab 10, Nemanich Dep. 85; Tab 3, Berry Dep. 111-12 ("there was a complimentary nature of the assets"); Tab 76, SRI 002602; Tab 15, TXDAG 0000358; Tab 17, EQDAG 0020552).

Plaintiffs' Response: See Responses to Paragraph Number 6, 12, 13, 18, *supra.* The deposition testimony cited does not support the statement. The documentary citations are insufficient without testimony to support the statement.

41. A primary function of both joint ventures was to maximize overall earnings and economic return on invested capital through the safe and efficient operation of the joint ventures' refinery, marketing, lubricants and pipeline assets. (Tab 76, SRI 002602; Tab 77, TXDAG 0000005).

Plaintiff's Response: Only the first part of the statement is accurate. The language about "safe and efficient operation of the joint ventures' refinery, marketing, lubricants and pipeline assets" is not supported by the record or the two documents cited, which are quoted out of context and not supported by deposition testimony.

42. The global chemical, aviation, and marine fuels businesses were not included in the joint ventures and the parties did not consolidate international businesses. Nor did

the parties combine upstream assets. (Tab 11, Tilton Dep. 157-60; Tab 3, Berry Dep. 28-33; Tab 9, Morgan Dep. 54, 107-08, 307, 450; Tab 12, Williams Dep. 81-83).

Plaintiffs' Response: This statement is argumentative in its effort to portray the excluded chemical, aviation, and marine fuels businesses as global. The defendants excluded their domestic chemical, aviation, and marine fuels businesses from The Alliance. (Joint Facts Stip. ¶¶ 49-50; Shulman Decl. Tabs 23-24.)

43. Those downstream assets not included in the joint ventures were de minimis. (Tab 8, Leffler Dep. 143-44).

Plaintiffs' Response: This statement is taken out of context in the sense that defendants seek to use it, in arguing that Equilon and Motiva are sufficiently integrated so as to avoid *per se* or rule of reason liability for price-fixing.

44. Equilon did not obtain Shell's partial interest in the Deer Park refinery. Deer Park was already a partnership between Shell and PEMEX, the Mexican national oil company. PEMEX was unwilling to allow Deer Park to be included in the joint venture. The Deer Park refinery does not produce branded gasoline. (Tab 12, Williams Dep. 82; Tab 3, Berry Dep. 29; Tab 4, Bijur 87). There are no marketing assets affiliated with the Deer Park refinery. (Tab 3, Berry Dep. 30). Equilon runs the Deer Park refinery under an arms-length contract with the Shell-PEMEX venture. (Tab 9, Morgan Dep. 295-97).

Plaintiffs' Response: The cited testimony does not support the last sentence. The cited testimony also establishes that the output of the Deer Park Refinery does not go entirely to Mexico or The Alliance, but also goes in part to other sellers, who may resell it as branded gasoline. Mr. Morgan also lacks foundation to testify to the contents of any written agreements concerning the Deer Park refinery, which defendants have not produced in discovery.

45. If the parties' marketing assets had not been included in the joint ventures, the joint ventures would have been less economically integrated. (Tab 8, Leffler Dep. 146-47).

Plaintiffs' Response: This statement is argumentative and lacks context, and does not support the conclusion argued for by defendants, that Equilon and Motiva are sufficiently integrated to avoid *per se* and rule of reason liability for price-fixing.

46. The Texaco and Shell trademarks are in use worldwide, associated with many products, not just gasoline, and are not in use solely in the United States downstream branded gasoline market. (Tab 11, Tilton Dep. 26; Tab 6, Burch Dep. 34; Tab 4, Bijur Dep. 43-45; Tab 9, Morgan Dep. 118; Tab 12, Williams Dep. 28-30).

Plaintiffs' Response: See response to Paragraph Number 45, *supra*.

47. Equilon's and Motiva's rights to market gasoline under the Shell and Texaco brand names are exclusive. Neither Shell nor Texaco has the right to market branded gasoline in the United States. (Tab 78, Equilon Texaco Trade Name and Trademarks License Agreement; Tab 79, Motiva Texaco Trade Name and Trademarks License Agreement; Tab 80, Shell Equilon Trade Name and Trademark Contribution and Maintenance Agreement; Tab 81, Shell Motiva Trade Name and Trademark Contribution and Maintenance Agreement; Tab 82, EQDAG 0013694-98; Tab 83, EQDAG 0013871-76).

Plaintiffs' Response: This statement is argumentative and is contradicted by other evidence of record. (Joint Facts Stip. ¶¶ 48-56; Shulman Decl. Tabs 20-32.)

48. The decision of the parent corporations not to transfer ownership of the Texaco and Shell trademarks was related to the global nature of the trademarks, the need for Shell and Texaco to protect the reputation of the trademarks and required by law. (Tab 11, Tilton Dep. 26-27; Tab 4, Bijur

Dep. 43-45, 168-69; Tab 9, Morgan Dep. 456-57; Tab 17, EQDAG 0020559; Tab 84, SH-DAG 012616-17).

Plaintiffs' Response: The evidence cited does not support the statement. Although the testimony does refer to global use of the trademarks and the desire of Shell and Texaco to protect the reputation of the trademarks, the evidence is wholly insufficient to establish that Shell and Texaco licensed the brands for legal reasons; and the evidence further affirmatively shows that Shell and Texaco licensed the brands because of the anticipated future dissolution of The Alliance.

49. There would have been costs incurred if the Shell brand had been eliminated as part of the formation of the joint ventures. (Tab 8, Leffler Dep. 108-09).

Plaintiffs' Response: This statement is argumentative and incomplete. It does not provide support for defendants' argument that it was more efficient for defendants to maintain and market the existing Shell and Texaco brands than it would have been for defendants to create a new brand for The Alliance.

50. There would have been costs incurred if the Texaco brand had been eliminated as part of the formation of the joint ventures. (Tab 8, Leffler Dep. 108-09).

Plaintiffs' Response: See response to Paragraph Number 49, *supra*.

51. There would have been costs incurred if a third or separate brand had been created as part of the formation of the joint ventures. (Tab 4, Bijur Dep. 168-69; Tab 8, Leffler Dep. 108-09).

Plaintiffs' Response: See response to Paragraph Number 49, *supra*.

52. In order to monitor Equilon and Motiva, the parties created Members Committees. The Members Committee for Equilon consisted of four representatives for Shell and three for Texaco; the Members Committee for Motiva consisted of

two members each for SRI, Shell and Texaco. (Tab 46, Equilon LLC Agreement, D000039-110; Tab 74, Motiva LLC Agreement, D000710-789).

Plaintiffs' Response: This statement is argumentative, incomplete, and misleading. The Members Committees were not created to "monitor" Equilon and Motiva. They were created to oversee and govern Equilon and Motiva by setting and approving policies, budget plans, budgets, strategies, and standards. (Shulman Decl. Tab 32.)

53. The Members Committee of Motiva has no responsibility for or role in the day to day operations of Motiva. (Tab 11, Tilton Dep. 14; Tab 6, Burch Dep. 151; Tab 74, Motiva LLC Agreement, D000710-789).

Plaintiffs' Response: See response to Paragraph Number 52, *supra*. Also, the testimony and documentation cited do not support the statement; and Mr. Burch, who has never been a member of the Members Committee of Motiva, lacks foundation to testify concerning the role or responsibility of the Members Committee.

54. The CEO of Motiva has responsibility for the day to day operations of Motiva. (*Id.*).

Plaintiffs' Response: See responses to Paragraph Numbers 52, 53, *supra*.

55. The Members Committee of Equilon has no responsibility for or role in the day to day operations of Equilon. (Tab 11, Tilton Dep. 15; Tab 46, Equilon LLC Agreement, D000039-110).

Plaintiffs' Response: See response to Paragraph Number 52, *supra*. In addition, the evidence cited does not support the statement.

56. The CEO of Equilon has responsibility for the day to day operations of Equilon. (*Id.*).

Plaintiffs' Response: See response to Paragraph Number 52, *supra*.

57. Since SRI does not participate in the Equilon joint venture, there is no restriction of any kind on SRI's right to compete against Equilon in refining or marketing gasoline in Equilon's area of operation. (Tab 85, SRI 003178; Tab 13, Woelfel Dep. 93-94, 117; Tab 2, Barnes Dep. 142-44).

Plaintiffs' Response: This statement is argumentative. Although SRI may be free to compete with Equilon in refining or marketing gasoline in Equilon's area of operation, it is not true that SRI does not participate in Equilon or that SRI's non-participation is the reason that SRI has freedom to compete against Equilon. A number of policies and activities have been undertaken on an Alliance-wide basis, such as the Strategic Marketing Initiative, which has led to defendants' price-fixing. SRI is involved in reviewing and approving such Alliance-wide activities, which necessarily affect Equilon. (Shulman Decl. Tab 37.)

58. Since their formation, Equilon and Motiva have been responsible for the refining, marketing and distribution of Shell and Texaco gasoline in their respective regions. (Tab 40, Broderick Declaration ¶ 4).

Plaintiffs' Response: As of the time plaintiffs first responded to this statement on July 25, 2001, defendants had provided plaintiffs with no record citations to support this statement. The defendants at that time provided plaintiffs only with a citation to "Broderick Declaration ¶ 4." Plaintiffs first saw this declaration on July 26, 2001, and objected to defendants' efforts to use this declaration to establish any fact for purposes of these proceedings. In an order of September 13, 2001, this Court afforded plaintiffs the opportunity to depose Mr. Broderick, which plaintiffs did on September 21, 2001. Mr. Broderick's deposition made clear the glaring lack of foundation for the many opinions in Mr. Broderick's declaration. Mr. Broderick, whose education ended with his undergraduate degree, was never an employee of Texaco, SRI, or Motiva (Deposition of Richard

A. Broderick ("Broderick Dep.") 18, 21);[3] had no position on either the Equilon or Motiva Members Committee and attended no Members Committee meetings (*id.* 22); and had absolutely no role or participation in the formation of The Alliance, and had nothing to do with estimating any of the claimed cost savings of The Alliance prior to its formation (*id.* 18-20). His declaration was prepared by counsel (*id.* 54-56); he has done no backup studies or analyses to support any of the statements in his declaration, leaving no written work papers to use in testing his many opinions (*id.* 56-57); and he has not quantified or even tried to quantify the claimed cost savings to which he opines (*id.* 68, 70). He has never been an officer of Equilon or Motiva (*id.* 90-91), never attended regular management meetings with officers (*id.*), and is unfamiliar with the basic agreements providing for the governance of Equilon and Motiva (*id.* 66-67), about whose management he opines. Mr. Broderick's primary opinion is not really relevant to the issues now before the Court. The thrust of his testimony is that it would have been impracticable and inefficient for Shell and Texaco to set prices for Equilon and Motiva. (*Id.* 60-61.) Setting aside the absence of foundation for such testimony as to Texaco and Motiva, the testimony itself does not prove, or even tend to show, that it was essential for the Alliance to fix prices for Shell and Texaco branded gasolines in order to achieve the efficiencies claimed by defendants for their combination. (Nor is it consistent with the undisputed evidence that Shell and Texaco controlled The Alliance's use of the Shell and Texaco brands.) Indeed, his testimony proves the contrary. From January to September of 1998, after the formation of Equilon, Equilon functioned with separate pricing mechanisms and organizations for the Shell and Texaco brands. The former Shell pricing department, transplanted to Equilon, set prices for Shell branded gasoline; while the

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[3] The deposition of Richard Broderick is attached as Exhibit A to the Supplemental Declaration of Andrew C. Finch ("Supp. Finch Decl.").

Texaco pricing organization, similarly transplanted to Equilon, set prices for Texaco branded gasoline. (*Id.* 24-44.) This is the testimony of Mr. Broderick: that for a period of time Equilon did not fix prices, and set prices separately for Shell and Texaco branded gasolines. Although the separate pricing was eliminated and price-fixing was implemented by September of 1998, there is absolutely nothing in Mr. Broderick's testimony, or anywhere else in this record, that such consolidation and price-fixing were necessary to achieve any claimed or anticipated efficiencies for The Alliance. To the contrary, all defense witnesses have testified that price-fixing had nothing to do with any expected cost savings. Moreover, even Mr. Broderick acknowledged that no cost savings were ever passed on to customers in the form of lower prices. (*Id.* 47-48.) In summary, Mr. Broderick's deposition establishes that his declaration is entitled to no weight in these proceedings.

Defendants' Reply: Plaintiffs' vague, blanket objection to the Declaration of Richard Broderick is procedurally inadequate and substantively baseless. It is absurd for plaintiffs to claim that Mr. Broderick lacks foundation for his statements. Mr. Broderick's declaration and now his deposition explain his extensive relevant experience over 34½ years at Shell and, subsequently Equilon (*see* Supp. Finch Decl. Ex. J (Broderick Dep. at 80:18)), including his personal experience in setting gasoline prices (*id.* at 86:8-19; 88:22-89-10), managing gasoline logistics, scheduling, and supply continuity (*id.* at 71:20-25; 89:4-10), managing refinery operating programs (*id.* at 72:7-13), doing supply programming work (*id.* at 7274:3-5), and being responsible for marketing operations as the Business Manager for Shell's Western Region (*id.* at 76:25-78:5). In addition, at Equilon since its formation, Mr. Broderick was personally responsible for the consolidation of the Shell and Texaco pricing systems into a new system that supports both Motiva and Equilon pricing. *Id.* at 68:9-14; 69:16-17. *See also* Broderick Decl. 2.

It is a telling admission for plaintiffs to assert that Mr. Broderick's declaration is "not really relevant to the issues" before the Court because it addresses whether it would have been inefficient for Shell and Texaco to set gasoline prices for Equilon and Motiva. This shows that plaintiffs are not challenging the pre-formation decision by the joint venture parents to consolidate the price-setting function in Equilon and Motiva, but are instead challenging only the independent, post-formation decisions by Equilon and Motiva, for the purpose of complying with the Robinson-Patman Act, to charge the same prices for Shell- and Texaco-branded gasoline to the same class of trade in the same geographic areas.

Despite that apparent admission, however, plaintiffs continue to argue that there is "nothing" in Broderick's testimony or elsewhere in the record to show that consolidation of the pricing function as part of the integration of the downstream operations of Shell, Texaco, and SRI (with respect to Motiva) were necessary for the joint ventures to achieve anticipated efficiencies. This is flatly wrong. Both Mr. Broderick's declaration and his deposition testimony—as well as the deposition testimony of James Morgan (Finch Decl. Ex. F (Deposition of James Morgan at 323:8 to 324:3))—prove that placing pricing responsibility in the joint ventures achieved efficiencies, both in terms of cost savings and in terms of achieving an efficient organizational structure for the joint ventures. Thus, Mr. Broderick explained that the price-setting process:

> [N]eeds to be integrated within one operation. The communications that [ ] would have to—that would have to occur back and forth between Equilon and its owners to arrive at a consensus on how the price should be set would be extraordinarily cumbersome, uncompetitive, and very costly.

Supp. Finch Decl. Ex J (Broderick Dep. at 86:14-21). In summary, plaintiffs are simply incorrect to argue that the

Broderick deposition does not demonstrate that cost savings and other efficiencies resulted from the consolidation of price-setting in the joint ventures.

Finally, plaintiffs' complaint that the Broderick declaration was "prepared by counsel" is also off-base. Mr. Broderick testified unambiguously that counsel did no more than transcribe his statements. *See id.* at 54:20-55:6; 55:15-56:15.[4]

59. All Shell and Texaco branded gasoline is produced and sold by Equilon and/or Motiva. (Tab 40, Broderick Declaration ¶ 4).

Plaintiffs' Response: See response to Paragraph Number 58, *supra*.

60. The prices at which Equilon and Motiva sell gasoline are determined by the management of Equilon and Motiva, respectively. (Tab 86, SRI 002225; Tab 6, Burch Dep. 22-27, 146, 151; Tab 9, Morgan Dep. 32-37, 321; Tab 7, Darnley Dep. 18-19, 37; Tab 4, Bijur Dep. 80).

Plaintiffs' Response: This statement is misleading, incomplete, and argumentative. Defendants have known and approved, first, that the same person sets prices for Shell and Texaco branded gasolines in each Equilon and Motiva pricing area, and, second, that the same person sets the same prices for Shell and Texaco branded gasolines in each Equilon and Motiva marketing area. (Shulman Decl. Tab 37.)

61. The pricing function is an integral part of the refining and marketing operation. (Tab 9, Morgan Dep. 322-24).

Plaintiffs' Response: The testimony cited does not support the statement. It is merely the response of one executive to questioning as to why Equilon did not have separate pricing personnel for the Shell and Texaco brands. The statement is also contradicted by the overwhelming evidence that pricing

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[4] [No text in footnote 4 in original.]

of the Shell and Texaco branded gasolines had nothing to do with any of the claimed synergies or efficiencies of The Alliance (Shulman Decl. Tabs 45, 47), as well as Mr. Broderick's deposition testimony that Equilon had separate pricing for the brands from its inception until September of 1998 (Broderick Dep. 24-44).

62. The removal of the pricing function from the refining and market operation would lessen the efficiencies that might otherwise be obtained. (Tab 9, Morgan Dep. 322-34). The decision of the parent corporations to place the pricing authority with the joint ventures was related to the efficiency-producing aspects of the joint ventures. (*Id.*; Tab 40, Broderick Declaration ¶¶ 4-6).

Plaintiffs' Response: The testimony cited does not support the statement. *See also* responses to Paragraph Numbers 58, 59, 61, *supra*. Plaintiffs object to any use of the Broderick declaration for the reasons stated in their response to Paragraph Number 58.

63. At some time after their formation, Equilon and Motiva each independently decided that Texaco and Shell branded gasoline were not functionally differentiated for purposes of the antitrust laws. Equilon decided that it would charge the same DTW prices for Shell- and Texaco-branded gasoline to the same class of trade in the same geographic areas. Motiva decided that it would charge the same DTW prices for Shell- and Texaco-branded gasoline to the same class of trade in the same geographic areas. (Tab 3, Berry Dep. 42-43; Tab 9, Morgan Dep. 33-37, 59-60, 379-83; Tab 7, Darnley Dep. 35, 68-69; Tab 6, Burch Dep. 28; Tab 17, Williams Dep. 24-25).

Plaintiffs' Response: The testimony cited does not support the first sentence of this statement. In addition, insofar as defendants may be trying to justify their price-fixing as Robinson-Patman compliance, this statement is immaterial and inadmissible as a matter of law. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). Further, defendants have waived and are estopped to assert any such

defense by, first, the failure of any defendant to include such an affirmative defense in its answer, and, second, repeated instructions to defense witnesses not to answer questions about counsel's advice on Robinson-Patman compliance, a number of which instructions are included in the deposition testimony cited. Defendants cannot omit this defense from their answers, block plaintiffs' discovery on the issue, and then raise it for the first time on their motion for summary judgment after the close of discovery. Finally, the testimony cited contains repeated references to inadmissible hearsay in the form of statements purportedly made by counsel, which hearsay is offered to prove the truth of the statements made, i.e., that Robinson-Patman compliance required defendants to fix prices.

64. The decision of the parent corporations to place the pricing authority with the joint ventures was related to the efficiency-producing aspects of the joint ventures. (Tab 9, Morgan Dep. 323-24; Tab 40, Broderick Declaration ¶¶ 4-6).

Plaintiffs' Response: The testimony cited does not support the statement, and is in fact contradicted by the overwhelming evidence that the pricing of Shell and Texaco gasoline had nothing whatever to do with any so-called efficiency-producing aspects of the defendants' combination. (Shulman Decl. Tabs 45, 47.) Plaintiffs also object to any use of the Broderick declaration for the reasons stated in their response to Paragraph Number 58.

65. Neither Texaco nor Shell participates in setting the prices for the wholesale or DTW gasoline that Equilon sells to its retail gasoline dealers. (Tab 7, Darnley Dep. 37; Tab 4, Bijur Dep. 80; Tab 40, Broderick Declaration ¶ 3).

Plaintiffs' Response: The testimony cited does not support the statement. The statement is also contradicted by the evidence regarding the Strategic Marketing Initiative (Shulman Decl. Tab 37) and the control over the brands retained by Shell and Texaco (Joint Facts Stip. ¶¶ 52-56). Plaintiffs also object to any use of the Broderick declaration

for the reasons stated in their response to Paragraph Number 58.

66. Neither Texaco nor Shell nor SRI participates in setting the prices for the wholesale or DTW gasoline that Motiva sells to its retail gasoline dealers. (Tab 6, Burch Dep. 151; Tab 4, Bijur Dep. 80; Tab 40, Broderick Declaration ¶3).

Plaintiffs' Response: See response to Paragraph Number 65, *supra*. Plaintiffs also object to any use of the Broderick declaration for the reasons stated in their response to Paragraph Number 58.

67. SRI does not own any interest in Equilon and does not participate in setting the prices for wholesale gasoline that Equilon sells to its retail dealers. (Tab 40, Broderick Declaration ¶¶ 3-6).

Plaintiffs' Response: Plaintiffs object to any use of the Broderick declaration for the reasons stated in their response to Paragraph Number 58. Also, see responses to Paragraph Numbers 34, 39, *supra*.

68. Equilon has produced between 200-500 new lubricants products since its formation. (Tab 10, Nemanich Dep. 11-13; Tab 11, Tilton Dep. 35; Tab 9, Morgan Dep. 67). Two of these products are Rotella Extended Life Coolant and Dialla-M transformer oil. (Tab 10, Nemanich Dep. 11-12, 15-16). Equilon is also working on a differentiated gasoline product. (Tab 7, Darnley Dep. 28).

Plaintiffs' Response: This statement is incomplete, misleading, and not material to the issues before the Court. Defendants have never claimed, nor is there any evidence to show, that it was necessary for them to form The Alliance in order to produce a product that each of the defendants would have been unable to produce separately. The undisputed evidence is that Equilon and Motiva have produced no fundamental new products. (Shulman Decl. Tab 34.)

69. Motiva is also responsible for new innovations. For example, Motiva started a Star Finish and Formula Finish car

wash business. Motiva introduced select convenience stores. Motiva also introduced a credit card program. (Tab 6, Burch Dep. 40-41).

Plaintiffs' Response: See response to Paragraph Number 68, *supra*.

70. Where either Motiva or Equilon obtains crude oil or other products or services from Shell, Texaco or SRI, it does so pursuant to arms' length transactions, on commercially reasonable terms. (Tab 9, Morgan Dep. 316-17).

Plaintiffs' Response: The testimony cited does not support the statement beyond crude oil purchases. The witness also is not competent to testify with respect to Motiva; and the testimony lacks foundation with regard to Equilon's purchases beyond crude oil.

71. Placing responsibility for setting gasoline DTW prices in the joint ventures achieved cost savings by allowing consolidation of pricing and related operations for both brands. (Tab 40, Broderick Declaration ¶ 5).

Plaintiffs' Response: Plaintiffs object to any use of the Broderick declaration for the reasons stated in their response to Paragraph Number 58. In addition, the statement is nothing more than unsupported opinion and conjecture with no quantitative or other support, and no showing that the witness is qualified to give the opinion. It is also directly contradicted by every higher ranking executive of defendants, Equilon, and Motiva deposed in this case, all of whom testified that pricing of Shell and Texaco branded gasolines had nothing to do with any alleged cost savings of The Alliance. (Shulman Decl. Tabs 45, 47.)

72. If Shell and Texaco, respectively, had been given responsibility for setting DTW prices of the Shell and Texaco branded gasoline, the joint ventures would have had much less control over their inventory and revenue streams, and the efficiency and responsiveness of refinery and distribution operations would have been seriously compromised. (Tab 40, Broderick Declaration ¶ 6).

Plaintiffs' Response: See responses to Paragraph Numbers 58, 71, *supra*.

73. The joint venture's relationship with its retailer network would become unworkable in a scenario where third parties (Shell and Texaco) would be setting the DTW price for gasoline sold to those retailers by Equilon and Motiva. (Tab 40, Broderick Declaration ¶ 6).

Plaintiffs' Response: See responses to Paragraph Numbers 58, 71, *supra*. In addition, Mr. Broderick is not qualified to express any opinion on dealer relations.

74. If the responsibility for setting DTW prices had not been in each joint venture, neither joint venture's management would have had the authority to make fundamental decisions affecting its financial performance. (Tab 40, Broderick Declaration ¶ 7).

Plaintiffs' Response: See responses to Paragraph Numbers 58, 71, *supra*. In addition, Mr. Broderick is not qualified to express an opinion concerning the powers, abilities, or performance of management of either Equilon or Motiva (especially Motiva, for whom he never worked).

75. The gasoline that is manufactured in refineries, distributed through pipelines and stored in tanks at distribution terminals meets generic specifications and is fungible. Additive packages are injected into the gasoline at the distribution terminals, at which time gasoline becomes branded gasoline. (Tab 3, Berry Dep. 35-37).

Plaintiffs' Response: The statement is incomplete and misleading in that the witness was responding to questioning concerning whether Shell and Texaco branded gasolines are separate products. The testimony cited is from the beginning only of his answers, which concluded by acknowledging that Shell and Texaco gasolines are separate and distinct products. (Shulman Decl. Tab 46.)

CONCLUSIONS OF LAW

1. Equilon and Motiva are each single economic entities whose decisions cannot constitute violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Equilon and Motiva are integrated joint ventures for the purpose of refining, marketing and distributing branded gasoline.

3. Texaco and Shell formed Equilon and Shell, Texaco and SRI formed Motiva with the intent of achieving synergies and cost efficiencies.

4. Neither Equilon nor Motiva constitutes an unlawful price fixing conspiracy for purposes of Section 1 of the Sherman Act.

5. The price-setting responsibility of each joint venture is sufficiently related to the efficiency-producing aspects of the joint ventures and thus not illegal *per se* under Section 1 of the Sherman Act, nor violative of the Sherman Act under a "quick look" analysis.

PROPOSED ORDER

This Court hereby grants defendants' motion for summary judgment and denies plaintiffs' motion for partial summary judgment. IT IS SO ORDERED.

Respectfully submitted,

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Nos. 04-805 and 04-814

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IN THE

Supreme Court of the United States

TEXACO INC.,

Petitioner,

v.

FOUAD N. DAGHER *ET AL.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER SHELL OIL COMPANY'S OPENING BRIEF

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QUESTION PRESENTED

Whether pricing decisions by a lawful joint venture or its owners with respect to the venture's own products may be condemned as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to these consolidated proceedings are Petitioners Shell Oil Company (No. 04-814) and Texaco, Inc. (No. 04-805), both defendants below, and the following Respondents, all plaintiffs below: Fouad N. Dagher; Bisharat Enterprises Inc.; Alfred Buczkowski; Esequiel Delagado; Mahwash Farzaneh; Nasser El-Radi; G.G.&R. Petroleum Inc.; H.J.F. Inc.; Kaleco Co.; Carlos Marquez; Sami Merhi; Edgardo R. Parungao; Ron Abel Serv. Center, Inc.; Gullermo Ramirez; Jerry's Shell Serv. Center, Inc.; Leopoloo Ramirez; Nazar Sheibaini; Sitara Management Corporation; Tinsel Enterprises Inc.; Quang Truong; Steven Ray Vezerian; Los Feliz Shell, Inc.; and Nassim Hanna. Saudi Refining Inc. was a defendant below but secured judgment in its favor on other grounds.

Petitioner Shell Oil Company is wholly owned by Shell Petroleum, Inc., a Delaware corporation, which is wholly owned by Shell Petroleum N.V., The Hague, The Netherlands. Shell Petroleum N.V. is owned 60% by Royal Dutch Petroleum Company, The Hague, The Netherlands, and 40% by The Shell Transport and Trading Company Limited, London, England. Royal Dutch Petroleum Company is a public company whose majority shareholder is Royal Dutch Shell plc, The Hague, The Netherlands (and of whose stock no other entity owns 10% or more). The Shell Transport and Trading Company Limited is wholly owned by Royal Dutch Shell plc.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6 ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 1

A. Factual Background 2

B. The Lower Courts' Rulings 4

SUMMARY OF ARGUMENT 8

ARGUMENT 12

I. Section 1 Does Not Apply To Decisions By A Joint Venture Or Its Owners About The Joint Venture's Own Products, Where The Owners Do Not Otherwise Compete In The Market 12

II. Pricing Decisions By A Lawful Joint Venture Or Its Owners With Respect To The Venture's Own Products Cannot Be Per Se Illegal Under Section 1 Of The Sherman Act 16

A. An Agreement By Joint Venture Partners With Respect To The Prices Of Multiple Products That Are Owned By Their Joint Venture Does Not Restrict Competition For Purposes Of Section 1 18

TABLE OF CONTENTS
(continued)

Page(s)

B. The Ninth Circuit's Application Of The Per Se Rule Is Flatly Inconsistent With This Court's Decision In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) 22

C. The Ninth Circuit Misapplied The Ancillary Restraints Doctrine To This Case 27

III. Application of the Per Se Rule Here Would Chill the Formation of Efficient, Pro-Competitive Joint Ventures 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. *Maricopa County Med. Soc'y*,
457 U.S. 332 (1982).....13, 20

Augusta News Co. v. *Hudson News Co.*,
269 F.3d 41 (1st Cir. 2001)..... *passim*

Blackburn v. *Sweeney*,
53 F.3d 825 (7th Cir. 1995) 32

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*,
441 U.S. 1 (1979)..... *passim*

Business Elecs. Corp. v. *Sharp Elecs. Corp.*,
485 U.S. 717 (1988).....16, 32

California Dental Assn. v. *FTC*,
526 U.S. 756 (1999).....22

Catalano, Inc. v. *Target Sales, Inc.*,
446 U.S. 643 (1980).....19, 20, 26

Chicago Professional Sports Limited Partnership v. *NBA*,
95 F.3d 593 (7th Cir. 1996) 13

Citizen Publ'g Co. v. *United States*,
394 U.S. 131 (1969).....20, 21, 24

City of Mt. Pleasant v. *Associated Elec. Coop.*,
838 F.2d 268 (8th Cir. 1988) 13

Continental T.V., Inc. v. *GTE Sylvania Inc.*,
433 U.S. 36 (1977).....16

Copperweld Corp. v. *Independence Tube Corp.*,
467 U.S. 752 (1984)..... *passim*

FTC v. *Borden Co.*,
383 U.S. 637 (1966).....4

TABLE OF AUTHORITIES
(continued)

Page(s)

FTC v. *Indiana Federation of Dentists*,
476 U.S. 447 (1986).....36

Los Angeles Mem'l Coliseum Comm'n v. *NFL*,
726 F.2d 1381 (9th Cir. 1984).....27

Monsanto Co. v. *Spray-Rite Service Corp.*,
465 U.S. 752 (1984).....9, 12

National Bancard Corp. v. *Visa U.S.A., Inc.*,
779 F.2d 592 (11th Cir. 1986).....25, 26, 33

National Collegiate Athletic Assn. v. *Board of Regents of Univ. of Okla.*,
468 U.S. 85 (1984)..... *passim*

Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*,
472 U.S. 284 (1985).....24

Nurse Midwifery Assocs. v. *Hibbett*,
918 F.2d 605 (6th Cir. 1990).....13

Polk Bros., Inc. v. *Forest City Enterprises, Inc.*,
776 F.2d 185 (7th Cir. 1985).....19, 31

Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*,
792 F.2d 210 (D.C. Cir. 1986)..... *passim*

SCFC ILC, Inc. v. *Visa USA, Inc.*,
36 F.3d 958 (10th Cir. 1994).....32

State Oil Co. v. *Khan*,
522 U.S. 3 (1997).....17, 36

Timken Roller Bearing Co. v. *United States*,
341 U.S. 593 (1951).....20

United States v. *Addyston Pipe & Steel Co.*,
85 F. 271 (6th Cir. 1898).....30

United States v. *Topco Associates*,
405 U.S. 596 (1972).....24

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. *Trenton Potteries Co.*,
273 U.S. 392 (1927) 17, 26

United States v. *Visa U.S.A., Inc.*,
344 F.3d 229 (2d Cir. 2003) 30

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko, LLP*,
540 U.S. 398 (2004) 35

Worthen Bank & Trust Co. v. *National BankAmericard Inc.*,
485 F.2d 119 (8th Cir. 1973) 32

STATUTES

15 U.S.C. § 1 ..... *passim*

15 U.S.C. § 13(a) 4

28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

Antitrust Guidelines for Collaboration Among Competitors,
4 Trade Reg. Rep. (CCH) ¶ 13, 161 (2000) 14, 34, 35

In the Matter of Standard Oil Co.,
49 F.T.C. 923 (1953) 4

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Antitrust Law (2d ed. 2003-2005) ..... *passim*

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871 (1994) 34

TABLE OF AUTHORITIES
(continued)

Page(s)

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-35a) is reported at 369 F.3d 1108. The District Court's opinions (Pet. App. 36a-74a) are unreported.[1]

JURISDICTION

The Court of Appeals entered its judgment on June 1, 2004. The court denied a timely petition for panel and en banc rehearing on September 15, 2004. Pet. App. 75a. The petition for a writ of certiorari was timely filed on December 17, 2004, and granted on June 27, 2005. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT

In 1998, Petitioners Shell Oil Company (Shell) and Texaco, Inc. (Texaco) formed two joint ventures that merged the companies' respective domestic gasoline refining and marketing operations and therefore eliminated competition between Shell and Texaco in the United States gasoline business. The Federal Trade Commission and several States allowed the formation of the joint ventures, and the legality of the ventures themselves has not subsequently been challenged in this or any other proceeding.

Respondents are Shell- and Texaco-branded service station

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[1] References to Pet. App. are to the appendix to Shell's certiorari petition, No. 04-814.

operators who purchased gasoline from Equilon. On behalf of a purported class of service station operators, Respondents alleged that Shell and Texaco violated Section 1 of the Sherman Act by agreeing that each joint venture would charge the same wholesale price in a given geographic trade area for the Shell and Texaco brands of gasoline now sold exclusively by that joint venture. Expressly disclaiming any reliance upon a full rule of reason theory, Respondents contended that this alleged agreement constituted a per se violation of Section 1. The District Court rejected the per se theory of liability and entered summary judgment in favor of Shell and Texaco. In a 2-1 opinion, the Court of Appeals reversed.

A. Factual Background

This case concerns two joint ventures formed by Shell and Texaco in 1998. The first, Equilon Enterprises LLC ("Equilon"), merged Shell's and Texaco's gasoline refining and marketing operations (so-called "downstream" operations) in the western United States. The second, Motiva Enterprises LLC ("Motiva"), in which Saudi Refining Inc. ("SRI") was also a partner, merged the parties' downstream operations in the eastern United States. Shell and Texaco continued to compete with each other in their domestic "upstream" operations (oil and gas exploration and production) and in both upstream and downstream operations internationally. Once Equilon and Motiva came into existence, however, Shell and Texaco no longer separately refined or marketed branded gasoline in the United States and thus no longer competed with each other in downstream domestic operations.[2]

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[2] Both courts below held that the Respondents lacked standing to pursue claims against SRI with respect to Motiva's operations because they purchase gasoline from Equilon, not from Motiva (Pet. App. 7a, 9a-11a, 69a), a determination Respondents have not

As the District Court found, Equilon was a legitimate, economically integrated joint venture, formed to reap cost savings and operating efficiencies of up to $800 million. Pet. App. 3a, 49a, 65a. That finding was undisputed by Respondents and accepted by the Court of Appeals. It was also supported by uncontroverted evidence showing that Shell and Texaco contributed substantial assets to the joint venture (including refineries, pipelines, terminals, lubricant plants, research laboratories, and thousands of service stations), and that Shell and Texaco agreed that the gains and losses of the venture would be allocated in proportion to the assets contributed to Equilon by each of the parent corporations (56% to Shell, 44% to Texaco). JA 76. Shell and Texaco each contributed its brand name to Equilon, by granting Equilon an exclusive license to sell gasoline under that brand name in the Equilon territory. Pet. App. 65a-66a.

Shell and Texaco presented their plans for the joint venture to the Federal Trade Commission, which conducted a detailed year-long investigation. Antitrust regulators in California, Hawaii, Oregon, and Washington also reviewed the proposed venture. After completing their investigations, all of these entities let the plans proceed, subject to certain limited modifications that were made. Pet. App. 3a.

After formation, Equilon itself (not Shell or Texaco) owned, refined and marketed the gasoline that it sold in the western United States under the Shell and Texaco brand names. Equilon likewise set the wholesale prices for the gasoline that it sold. Prices in each trade area were set based on conditions in that particular trade area. JA 79. The independent service station operators continued to determine, on their own, the prices to charge consumers for Shell- and Texaco-branded gasoline at the pump. JA 79.

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challenged here. Thus, only Respondents' claim against Equilon remains at issue, and this brief will largely refer to Equilon alone.

To steer clear of potential issues under the Robinson-Patman Act, which prohibits price discrimination for products of "like grade and quality" (15 U.S.C. § 13(a)), Equilon established a policy of charging the same wholesale price for a particular grade of Shell-branded gasoline as it charged for the same grade of Texaco-branded gasoline when it sold both brands in the same geographic trade area. The two brands are identical except for their brand names and additive packages.[3]

By setting the same wholesale prices for Shell- and Texaco-branded gasoline in each trade area in which it sold both brands, Equilon avoided the litigation costs and risks associated with potential Robinson-Patman Act claims by service station operators such as plaintiffs here.

B. The Lower Courts' Rulings

Respondents sued under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging that Shell and Texaco had engaged in an unlawful "price fixing" conspiracy through Equilon's pricing policy. Respondents waived any claim that Equilon's charging the same price for Shell- and Texaco-branded gasoline had any anticompetitive effect within a relevant market, as would be required under rule of reason analysis. Instead, Respondents alleged that Equilon's pricing policy constituted per se unlawful "price fixing" by Shell and Texaco.

Following extensive discovery, the parties filed cross-motions for summary judgment. The District Court granted summary judgment for Shell and Texaco. The court rejected

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[3] This Court has held that products are not differentiated for Robinson-Patman Act purposes by separate brand identities (*FTC* v. *Borden Co.*, 383 U.S. 637, 645-46 (1966)), and the Federal Trade Commission has held that "chemical analysis" is not the "important competitive factor" in retail gasoline distribution (*In the Matter of Standard Oil Co.*, 49 F.T.C. 923, 952 (1953), *vacated on other grounds, Standard Oil Co.* v. *FTC*, 233 F.2d 649 (7th Cir. 1956)).

Respondents' argument that Equilon's setting its wholesale prices for its own products could be condemned without regard to actual competitive effects in a relevant market.[4] The court noted that all joint ventures "must, at some point, set prices for the products they sell." Pet. App. 43a-44a. Adoption of Respondents' theory, the court reasoned, would effectively result in "a per se rule against joint ventures between companies that produce competing products." Pet. App. 45a. Indeed, as the District Court observed, Respondents "would only allow joint ventures to establish prices for products that were somehow fundamentally new or different from those made by the parents."[5] Pet. App. 44a. The District Court also found it irrelevant that Equilon charged the same wholesale prices for its two brands when it sold both brands in the same trade area: "Whether Equilon and Motiva charge the same or different prices for both brands, each literally 'fixes' a price where [Shell and Texaco] formerly set prices independently. Yet they and every other joint venture must, at some point, set prices for the products they sell." Pet. App. 43a.

The Ninth Circuit reversed, holding that Equilon's pricing policy could be per se illegal unless Shell and Texaco showed that the *particular* pricing decision – that is, charging the same price for the two brands in a trade area, not just the

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[4] Respondents also asserted a "quick look" theory. The District Court rejected that theory, Pet. App. 60a, and the Court of Appeals declined to reach it, Pet. App. 7a, 13a n.7.

[5] The District Court also noted: "Shell, Texaco and SRI did not jointly agree pre- or post-formation on one universal price that would be applied nationally through Equilon and Motiva. Furthermore, they had no reason to compete because once Equilon and Motiva were formed, Shell, Texaco and SRI no longer competed in the market for Shell and Texaco branded gasoline, either amongst themselves or against the ventures in the United States." Pet. App. 44a.

unified setting of prices for both brands – was "reasonably necessary" to achieve the efficiencies that led to Equilon's creation.

With respect to the threshold question whether Section 1, which addresses only concerted action, applied at all, the majority acknowledged that, "for some purposes at least," joint ventures that consist of a true pooling of assets and sharing of risks are to be considered "single firm[s] competing with other sellers in the market." Pet. App. 16a (internal quotations omitted). The majority also acknowledged that Equilon involved just such a "collective assumption of risk and resource pooling," and that Equilon was a "legitimate," efficiency-enhancing joint venture. Pet. App. 4a-5a. It was also undisputed that no unified pricing was implemented until Equilon formally came into existence. JA 78-79. The majority nevertheless concluded that Section 1 applied to Equilon's pricing of its own products because it found that there was a factual dispute whether the decision to price the brands the same had been made "immediately before" the ventures' actual formation rather than "shortly thereafter." Pet. App. 4a-5a.[6] The majority concluded that, if the pricing decision had been made prior to the ventures' actual formation, it "was not a decision made by a single economic entity – it was a decision made by competitors."

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[6] Some of the Ninth Circuit's generalized language does not distinguish between the formation of Equilon, which took place as of January 1, 1998 (JA 73), and the formation of Motiva, which took place six months later, as of July 1, 1998 (JA 73). But the Ninth Circuit notes only evidence that the pricing decision preceded *Motiva's* formation. Pet. App. 5a ("There is some evidence in the record establishing that the decision to set one price for the two brands was conceived of in the SMI even before *Motiva* was formed.") (emphasis added). The court does not cite any evidence that the decision preceded Equilon's formation or that it preceded Shell's and Texaco's agreement to form Equilon and Motiva. *See* Pet. App. 5a.

Pet. App. 19a n.11.

With respect to the issue of what mode of analysis to apply under Section 1 – per se or rule of reason – the majority observed that price fixing "is the quintessential example of a *per se* violation of § 1." Pet. App. 14a. The court acknowledged, however, that, in the context of economically integrated joint ventures, Section 1's "blanket prohibition on price fixing . . . cannot be read literally." Pet. App. 15a. For example, as this Court held in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* at 9. Moreover, when restraints that might otherwise be subject to per se condemnation are ancillary to a legitimate joint venture (*i.e.*, are "reasonably necessary to further the legitimate aims of the joint venture," Pet. App. 21a), they are analyzed under the rule of reason. *See, e.g.*, *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-03 (1984).

The Ninth Circuit held that the manner in which Equilon set the prices for its own products here could not be deemed "reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 21a. In so holding, the court focused on the fact that Equilon set "one, unified price for both the Texaco and Shell brands of gasoline" and then inquired whether that particular pricing decision was reasonably necessary to further the aims of the venture. Pet. App. 21a. While purporting to acknowledge that "joint ventures may price their products," the majority framed the question as "whether two former (and potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands." Pet. App. 27a-28a.

Judge Fernandez dissented. He noted that, upon Equilon's formation, it was Equilon, not Shell and Texaco, that

competed in the business of refining, transporting, and marketing gasoline in the western United States. Pet. App. 31a-32a. And, as he noted, Equilon, not Shell and Texaco, "manufactured, inventoried, transported, and marketed the products" and thus set the price "for *its* Shell and Texaco brands." Pet. App. 31a, 32a. Judge Fernandez concluded that Equilon's setting the prices for its own products was not just reasonably necessary, but "integral," to the legitimate aims of the joint venture:

> "In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?"

Pet. App. 34a. In Judge Fernandez's view, the majority's "price-fixing" label was plainly inapplicable.

SUMMARY OF ARGUMENT

The formation of the Equilon and Motiva joint ventures to realize economies of scale and other efficiencies eliminated all competition between Shell and Texaco in the United States branded gasoline business. As the District Court found, "once Equilon and Motiva were formed, Shell, Texaco and SRI no longer competed in the market for Shell and Texaco branded gasoline, either amongst themselves or against the ventures in the United States." Pet. App. 44a. The formation of these joint ventures was reviewed by the Federal Trade Commission and numerous state antitrust regulators and is not challenged in this action. The business decisions that are challenged in this action relate exclusively to the pricing of products owned and controlled by the joint ventures, and those decisions did not restrict any aspect of the independent

business of either Shell or Texaco. The challenged decisions therefore could not and did not restrict any competition that continued to exist once the two concededly lawful joint ventures were formed.

These facts mean that, for the following reasons, the challenged restraints are not per se illegal under Section 1 of the Sherman Act and the Ninth Circuit's decision must be reversed.

1. As this Court has repeatedly held, the Sherman Act contains a "basic distinction between concerted action and independent action." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984); *see Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). The conduct of a single firm is governed not by Section 1, which Respondents rely on here, but by Section 2 alone. *Copperweld*, 467 U.S. at 767.

Likewise, Section 1 does not apply to the joint conduct of entities that have "a complete unity of interest" with respect to the economic activity in question. *Copperweld Corp.*, 467 U.S. at 770-71. Thus, even if the pricing policy here had been agreed upon by Shell and Texaco rather than decided upon by venture management, Section 1 should not apply. Such an agreement would merely constitute collective decision making of partners in a joint venture about the business of that venture, where the partners are merging all of their relevant business activities and therefore do not compete with the venture. In those circumstances, the partners have a complete unity of interest – they are acting exclusively as the co-owners of a single business – and any agreement would not restrict competition any more than do agreements between a parent corporation and its wholly owned subsidiary. Section 1 therefore does not apply to the alleged agreement by Shell and Texaco about their joint venture's pricing of its own products.

2. Even if Section 1 of the Sherman Act did apply, the per

se rule would not. The rule of reason is the presumptive mode of analysis under Section 1. The per se rule applies only where a restraint is one that "would always or almost always tend to restrict competition and decrease output." *National Collegiate Athletic Assn.*, 468 U.S. at 100. The setting of prices for multiple products of a single economically integrated joint venture cannot be per se illegal under Section 1 of the Sherman Act. Because such products are not in competition with each other for purposes of Section 1 analysis, joint venture decisions about the prices for such products neither restrict competition nor decrease output, regardless of whether those decisions are made by venture management or the venture's owners.

a. Because the formation of the joint ventures here lawfully eliminated all competition between the Shell and Texaco brands of gasoline in the wholesale market, any alleged agreement by Shell and Texaco with respect to their ventures' wholesale pricing of those brands could not restrict competition. Such an agreement would not be an "agreement[] among competitors to fix prices on their individual goods or services," *Broadcast Music*, 441 U.S. at 8, and therefore would not be per se illegal "horizontal price fixing," *National Collegiate Athletic Assn.*, 468 U.S. at 99-100. It does not matter whether such an agreement were reached "immediately before" actual formation of the joint ventures or "shortly thereafter," because it is undisputed that any such agreement would have taken effect only after the joint ventures had been formed and, thus, after competition between the brands at wholesale had ceased. Because the alleged agreement did not restrict competition that would otherwise have existed, it cannot be per se illegal. At most, such an agreement would be subject to evaluation under the rule of reason.

b. The Ninth Circuit's application of the per se rule squarely conflicts with this Court's decision in *Broadcast Music, Inc.* In *Broadcast Music,* the Court held that, if a joint

venture is legitimate, the establishment of prices for the products of that joint venture is not per se illegal price-fixing. Setting of prices for the venture's own products is "a necessary consequence of the integration necessary to achieve [the venture's] efficiencies." *Id.* at 21.

c. The Ninth Circuit erred in applying the "ancillary restraints" doctrine. That doctrine is relevant only where the challenged conduct restricts competition that would otherwise continue to exist between the joint venture partners, or between the venture and one or more of the partners, after the formation of the venture. For example, an agreement that joint venture partners will not sell non-venture products in competition with the venture would properly be analyzed under the ancillary restraints doctrine. Here, by contrast, once Equilon was formed, neither Shell nor Texaco competed in the same business as the joint venture, and the alleged agreement therefore could not restrict competition that would otherwise have existed. Moreover, even if the ancillary restraints doctrine applied here, *Broadcast Music* establishes that the setting of prices for a joint venture's products is sufficiently related to the business of a joint venture to render the restraint challenged here "collateral and subordinate" to the venture and therefore beyond the purview of the per se rule.

3. A rule that decisions by a lawful joint venture or its owners with respect to the prices for that venture's own products may be per se illegal would chill the formation of legitimate, pro-competitive joint ventures. Joint ventures are an increasingly common form of business organization that can significantly increase efficiency and benefit consumers. The Ninth Circuit's unprecedented extension of the per se rule to the pricing decisions of such ventures would deter companies from engaging in these efficiency-enhancing activities. Moreover, because the per se rule is itself a creation of the courts, it is properly the responsibility of the courts, not Congress (as the majority below suggested, Pet.

App. 28a-29a), to ensure that the per se rule is applied in a manner that is fair, efficient, and consistent with antitrust policy, economic theory and this Court's precedents.

ARGUMENT

I. SECTION 1 DOES NOT APPLY TO DECISIONS BY A JOINT VENTURE OR ITS OWNERS ABOUT THE JOINT VENTURE'S OWN PRODUCTS, WHERE THE OWNERS DO NOT OTHERWISE COMPETE IN THE MARKET.

A threshold question in any Section 1 case is whether the challenged restraint should be classified as that of a single entity (or the economic equivalent of a single entity) or of multiple entities. Section 1 "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities." *Copperweld Corp.*, 467 U.S. at 768; *see Monsanto*, 465 U.S. at 761. Section 1 does not reach "[t]he conduct of a single firm," which "is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Copperweld*, 467 U.S. at 767. The more exacting standard that applies to concerted action reflects Congress' judgment that there is a greater risk to competition with "a sudden joining of two independent sources of economic power previously pursuing separate interests." *Id.* at 769, 771. By contrast, where there is no such joining of separate interests, companies should be able to compete vigorously without having their "every action [subjected] to judicial scrutiny for reasonableness." *Id.* at 775.

In *Copperweld*, the Court applied this rule to the joint conduct of a parent corporation and its wholly owned subsidiary, holding that an agreement between such entities should not be classified as concerted action for purposes of Section 1. Although the parent and its wholly owned subsidiary in *Copperweld* were legally separate entities, they

had "a complete unity of interest" and coordination between them therefore did "not represent a sudden joining of two independent sources of economic power previously pursuing separate interests." *Id.* at 770-71.

This Court has further indicated that the operation of the business of a legitimate joint venture should be treated, for Section 1 purposes, as the conduct of a single firm, not concerted action. In *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), this Court stated that a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the market." *Id.* at 356; *see* VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478c, at 325 (2d ed. 2003) ("[o]nce a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy"). As a result, decisions with respect to the operation of a fully-integrated business venture are not subject to Section 1 scrutiny at all. *Copperweld*, 467 U.S. 767-68; *Maricopa*, 457 U.S. at 356; *City of Mt. Pleasant* v. *Associated Elec. Coop.*, 838 F.2d 268, 276-77 (8th Cir. 1988); *Nurse Midwifery Assocs.* v. *Hibbett*, 918 F.2d 605, 616 (6th Cir. 1990); *see also Chicago Professional Sports Limited Partnership* v. *NBA*, 95 F.3d 593, 600 (7th Cir. 1996).

Nor should Section 1 apply to the collective decision-making of partners in a joint venture about the business of that venture, where the partners are merging all of their relevant business activities. The logic behind treating the collective conduct and decisions of multiple entities as "single firm conduct" under Section 1 is that, in certain circumstances – such as that of parent and wholly owned subsidiary – the various entities have identical economic interests with respect to the relevant business. They do not represent "two

independent sources of economic power . . . pursuing separate interests" but have "a complete unity of interest." *Copperweld*, 467 U.S. at 771. Because they are not pursuing separate economic interests and are not competing with each other, there is no possibility that an agreement between them will restrict competition.

This logic applies with full force to the collective decision-making of partners in a fully-integrated joint venture, such as decisions by Shell and Texaco about the business of Equilon. *Cf. id.* at 776 ("the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary.") Because the formation of such a joint venture will itself eliminate all relevant competition between the partners, a decision about the operation of the venture, once formed, cannot further restrict competition and is therefore not a proper subject of Section 1 inquiry. Here, the formation of Equilon (which *was* a "sudden joining of two independent sources of economic power" and therefore properly subject to Section 1 scrutiny)[7] itself eliminated all competition between Shell and Texaco with respect to the domestic gasoline business. A decision about the post-formation operation of that venture should therefore not be subject to scrutiny under Section 1.

Moreover, it does not matter whether such a decision is

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[7] Under the *Antitrust Guidelines For Collaboration Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) (available at <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>) promulgated by the FTC and the Department of Justice, the venture would be analyzed under the same standards as a merger, because the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market, ends all competition between the participants in that market, and lasts for a sufficiently long period. *Id.* § 1.3 & App. Ex. 1.

made before rather than after the venture formally comes into existence. Indeed, in forming a joint venture, there are any number of decisions that must be made about how the joint venture should operate. Those decisions help the parties evaluate potential operating efficiencies of the venture and the necessary terms of its operation. So long as such a decision relates solely to the post-formation operation of the venture, there is a "complete unity of interest," and the decision itself cannot restrict competition.

Here, the Ninth Circuit ignored this fundamental principle, focusing instead on what it identified as a factual dispute whether the decision to unify the pricing of the Shell and Texaco brands was made "immediately before" the formation of the ventures or "sometime shortly thereafter." Pet. App. 4a, 5a. It is undisputed, however, both that the decision was not made before the parties had agreed to form the joint ventures and that the decision related exclusively to the post-formation business of the ventures. Thus, at the time of the decision, Shell and Texaco had identical interests with respect to their future business: both Shell's and Texaco's gains or losses would depend entirely on the *overall* profitability of the joint ventures, without regard to relative sales of Shell- and Texaco-branded gasoline; and, because neither Shell nor Texaco would continue to market branded gasoline in the United States, the operation of the joint ventures could not affect the profitability of their separate businesses. Moreover, if operational planning for a complex new joint venture had to await actual formation of the venture to avoid antitrust risk, the result would be a significant disruption – here, to the detriment of consumers and, as a significant portion of the nation's gasoline supply is involved, the American economy. *Cf. Copperweld*, 467 U.S. at 773 ("Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its

exposure to antitrust liability.").

At the time the decisions about Equilon's pricing of Shell and Texaco-branded gasoline were made, Shell and Texaco had a complete unity of economic interest with respect to those decisions. Like coordination between two corporate affiliates, coordination between Shell and Texaco in this circumstance did not "represent a sudden joining of two independent sources of economic power previously pursuing separate interests" but rather represented conduct of the co-owners of a single business. Such coordination is neither "concerted action," *see Copperweld*, 467 U.S. at 769-78, 781, nor "an agreement among competitors on the way in which they will compete with one another," *National Collegiate Athletic Assn.*, 468 U.S. at 99. Accordingly, Section 1 of the Sherman Act should not apply.

II. PRICING DECISIONS BY A LAWFUL JOINT VENTURE OR ITS OWNERS WITH RESPECT TO THE VENTURE'S OWN PRODUCTS CANNOT BE PER SE ILLEGAL UNDER SECTION 1 OF THE SHERMAN ACT.

Even if Section 1 of the Sherman Act did apply, the per se rule certainly would not. The fundamental question in any case under Section 1 is whether competition has been unreasonably restrained by the defendants. This Court has consistently held that, in answering that question, the rule of reason is the presumptive mode of analysis, while the per se rule should be applied only in very limited circumstances. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49, 58-59 (1977) (the rule of reason is the "prevailing standard of analysis," any departure from which "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing"); *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard"). The per se rule may be applied only to an agreement that "facially

appears to be one that would always or almost always tend to restrict competition and decrease output." *National Collegiate Athletic Assn.*, 468 U.S. at 100; *see also State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997) ("predictable and pernicious anti-competitive effect[s]" as well as "limited potential for pro-competitive benefits" are prerequisites to application of per se rule) (citing *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958)). The crucial question is whether the challenged restraint is one that will almost invariably and without justification *reduce competition that would otherwise exist*. If not, there is no basis to apply the per se rule.

One of the categories of restraints to which the Court has said that the per se rule may properly be applied is "agreements among competitors to fix prices on their individual goods or services," *Broadcast Music*, 441 U.S. at 8, otherwise known as "horizontal price fixing" agreements, *National Collegiate Athletic Assn.*, 468 U.S. at 100. The Court has emphasized, however, that the phrase "price fixing" is merely "a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable," that "[l]iteralness is overly simplistic and often overbroad," and that the question is not simply "whether two or more potential competitors have literally 'fixed' a 'price'." *Broadcast Music*, 441 U.S. at 9. Thus, while "agreements among *competitors* to fix prices on their *individual goods or services* are among those concerted activities that the Court has held to be within the per se category," *id.* at 8 (emphases added), "[w]hen two *partners* set the price of *their* goods or services they are literally 'price fixing,' but they are *not per se* in violation of the Sherman Act," *id.* at 9 (emphases added). This is true because, as this Court has recognized, "[t]he aim and result of every [illegal] price-fixing agreement, if effective, is the elimination of one form of competition," *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397 (1927), but partners' pricing their jointly-owned goods or services does not eliminate any form of competition.

A. An Agreement By Joint Venture Partners With Respect To The Prices Of Multiple Products That Are Owned By Their Joint Venture Does Not Restrict Competition For Purposes Of Section 1.

When *competitors* jointly set the prices of their *individual goods*, they eliminate price competition that would otherwise exist between those goods. That is generally per se illegal "horizontal price fixing."[8] By contrast, when *partners* jointly set the prices of *the partnership's goods*, they do not eliminate competition at all, because those goods are not in competition with each other. Therefore, even if Section 1 applies to such joint setting of prices for partnership goods, this is not "price fixing" subject to the per se rule.

If the Ninth Circuit's decision were the law, it would be per se illegal, for example, for three lawyers who agreed to form a new law firm, but who had previously competed, to agree on the rates that they would charge for their services once the law firm was operational. Under the Ninth Circuit's reasoning, that would be per se illegal price fixing among former competitors. Any such result would be self-evidently absurd, and the only courts ever to have considered the issue have roundly (and quite correctly) rejected it. *See Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 n.10 (D.C. Cir. 1986) (Bork, J.) ("Although literally price fixing among competitors, fee schedules imposed by a law

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[8] *See National Collegiate Athletic Assn.*, 468 U.S. at 99-100 (defining a horizontal agreement as "an agreement among competitors on the way in which they will compete with one another"); *Augusta News Co.* v. *Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) ("The only price-fixing agreements that are condemned *per se*, with one narrow exception (minimum resale price-fixing), are agreements (1) between competitors (2) as to competing products or services (3) where, in addition, the agreement is not part of a larger economic venture.").

partnership are accepted, even taken for granted."); *Polk Bros., Inc.* v. *Forest City Enterprises, Inc.*, 776 F.2d 185, 190 (7th Cir. 1985) ("The partners of a newly-formed law firm agree on fees and allocate subjects of specialty and clients among them; this 'price fixing' and 'market division' do not become unlawful just because the firm is new.").

Here, the Ninth Circuit analyzed the Equilon pricing policy as an agreement between "competitors" that could constitute per se illegal price fixing. Pet. App. at 19a n.11. In so doing, the Ninth Circuit failed to appreciate the significance of its own finding that, once the Equilon and Motiva joint ventures were formed, there would be and was no further competition between Texaco- and Shell-branded gasoline. Pet. App. 4a ("The creation of the alliance ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline."); *see* Br. in Opp. 10 ("[Shell and Texaco] continued to exist and compete with each other . . . *except [in] the United States*") (emphasis added).

Because the formation of the joint ventures – reviewed by the government and not challenged by Respondents – eliminated all competition between the two brands of gasoline, an agreement with respect to the prices that the joint ventures would subsequently charge for those two brands could not restrict competition that would otherwise have existed and therefore would not be "horizontal price fixing." *See National Collegiate Athletic Assn.*, 468 U.S. at 99-100. Such an agreement could not be anti-competitive at all, far less have "such predictable and pernicious anticompetitive effect" as to be per se illegal under this Court's decisions. Such an agreement would not be "an agreement among competitors on the way in which they will compete with one another." *National Collegiate Athletic Assn.*, 468 U.S. at 99; *see also Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 649 (1980) (*per curiam*) (holding that "horizontal price fixing" is illegal per se and defining "horizontal agreements"

as those "among competitors imposing one kind of voluntary restraint or another on their competitive freedom").

Indeed, the elimination of all competition between Shell and Texaco through the formation of legitimate, pro-competitive joint ventures fundamentally distinguishes this case from three of this Court's decisions on which the Ninth Circuit relied. In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), the Court applied the per se rule because the "joint venture" was a mere sham designed to mask a naked horizontal agreement to allocate territories. *Id.* at 597 ("That the trade restraints were merely incidental to an otherwise legitimate 'joint venture' is, to say the least, doubtful."). Here, in contrast, the joint venture at issue is indisputably *bona fide*.

Similarly, in *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), the Court found a purported joint venture among physicians to be per se illegal because the venture consisted *solely* of the physicians' agreement on the maximum prices they would charge for particular procedures. The venture was not truly integrated for antitrust purposes, because it was "not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Id.* at 356. As noted above, it is undisputed that Equilon was an economically integrated joint venture, with Shell and Texaco sharing the risks and rewards of the venture in proportion to the substantial assets each contributed. J.A 76. The Court expressly recognized in *Maricopa* that, where a physicians' agreement is accompanied by a true economic integration – such as "[i]f a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agreement among the doctors would be perfectly proper." *Maricopa*, 457 U.S. at 357.

Finally, in *Citizen Publ'g Co.* v. *United States*, 394 U.S.

131 (1969), the two daily newspapers in Tucson, Arizona, created an operating entity to set advertising and subscription rates for both newspapers but did not contribute their core operations – the news and editorial units – to the venture. The venture therefore set agreed-upon prices for output that the venture did not own. Here, by contrast, Equilon owned the entirety of the combined downstream operations and did not have a role in pricing *any* non-venture output. Application of the per se rule is therefore inappropriate. *See* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1908e, at 263-64 (2d ed. 2005) (so long as joint venturers do not "enter into any agreement to fix the price of their nonventure output," no charge of per se illegality is appropriate).

The Ninth Circuit, as noted above, based its decision in part on the assumption that there was a disputed issue of fact whether the decision to price the two brands the same at wholesale in the same trade area was made "immediately before the formation of the joint ventures or sometime shortly thereafter." Pet. App. 4a-5a. But the timing of such a decision, as opposed to when it would take effect, is irrelevant to the proper mode of Section 1 inquiry, just as it is irrelevant to whether the decision is subject to Section 1 scrutiny at all. It is undisputed that any such decision was to *take effect* only after each joint venture had been formed and was operational – that is, only after all competition between the two brands had already ceased. There is no allegation or evidence of any agreement whatsoever with respect to the prices to be charged for any product at a time when that product was owned or controlled by any entity other than one of the joint ventures. Thus, even assuming an agreement with respect to *post-formation* pricing was reached "immediately before" the actual formation of the joint ventures, such an agreement would not have restricted competition and therefore could not conceivably be per se illegal.

Simply put, if Section 1 applies to the conduct at issue here,

the proper mode of analysis is under the rule of reason.[9] Because Respondents expressly disclaimed any reliance on such a theory, the failure of their per se theory necessitates reversal.[10]

B. The Ninth Circuit's Application Of The Per Se Rule Is Flatly Inconsistent With This Court's Decision In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

The Ninth Circuit's ruling is flatly inconsistent with this Court's decision in *Broadcast Music, Inc.*, 441 U.S. 1, where the Court rejected application of the per se rule to the pricing of a joint venture's products. The Ninth Circuit treated Equilon's pricing policy for the products it sold as a naked agreement between competitors to fix prices. But, as in *Broadcast Music*, Equilon's setting of the prices for its own goods was clearly part of a cooperative venture that had the potential to increase output through cost savings and efficiency gains, and it was a necessary consequence of that integration. Indeed, without setting the prices at which its

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[9] Indeed, "[i]f the *per se* rule were applied to joint ventures a paradoxical result would emerge: ventures would be treated more harshly than mergers, although mergers clearly have greater potential for diminishing competition." Carl Shapiro and Robert D. Willig, ON THE ANTITRUST TREATMENT OF PRODUCTION JOINT VENTURES, 4 J. Econ. Perspective 113, 119 (1990).

[10] Although Respondents asserted a "quick look" theory below, the District Court rejected that theory for the same reasons that it rejected application of the per se rule, Pet. App. 60a, and the Court of Appeals declined to reach the quick look theory, Pet. App. 7a, 13a n.7. "Quick look" analysis is available only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *California Dental Assn.* v. *FTC*, 526 U.S. 756, 770 (1999). As demonstrated above, the agreement challenged here could not have had any anticompetitive effect.

goods would be sold, Equilon could not have accomplished its purpose at all.

Broadcast Music involved a joint venture of composers, writers and publishers that sold blanket licenses to perform any and all of the copyrighted musical compositions owned by a member or affiliate. *Id.* at 4-7. Fees for the blanket licenses did not directly depend on the amount or type of music used. A television network alleged that the system by which the fees were set constituted price fixing that was per se illegal under Section 1 of the Sherman Act. *Id.* at 6. After the district court dismissed the complaint, the Court of Appeals reversed. *Id.* at 7.

This Court reversed the Court of Appeals and expressly rejected the argument that participants in a legitimate joint venture engage in per se illegal price fixing when they set the price at which the venture sells its products to third parties. As the Court stated, in language equally applicable here, "[w]hen two partners set the price of their goods and services they are literally 'price fixing,' but *they are not per se in violation of the Sherman Act.*" *Id.* at 9 (emphasis added). The Court added that "[j]oint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23.

Here, as in *Broadcast Music*, the joint venture itself was indisputably not a "naked [restraint] of trade with no purpose except stifling of competition" but was instead "one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 20. And here, as in *Broadcast Music*, the setting of prices for the joint venture's products was "a necessary consequence of the integration necessary to achieve these efficiencies." *Id.* at 21; *see* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1908e, at 237 (2d ed. 2005) (where a joint venture makes one or more products, "[o]nce [those products] are manufactured[,] they are jointly owned, and cannot be sold without an agreement between the

owners as to the price that will be charged for them"). Under *Broadcast Music*, therefore, any agreement by Shell and Texaco about the pricing of their joint ventures' products cannot, as a matter of law, be per se illegal. [11]

Two decisions by the Courts of Appeals further demonstrate the correct application of *Broadcast Music* in the current context. In *Augusta News*, the plaintiff brought an action under Section 1 of the Sherman Act against a joint venture formed by wholesale newspaper and magazine distributors to service the regional needs of large chain retailers. The plaintiff argued that the joint venture's practice of paying up-front fees to chain retailers on a per-store basis constituted a form of price fixing and was therefore per se illegal. 269 F.3d at 47.

The First Circuit squarely rejected this contention. The

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[11] *Broadcast Music* further demonstrates that the Ninth Circuit's reliance on this Court's decision in *Citizen Publ'g* was misplaced. To the extent that *Citizen Publ'g* might be read for the proposition that pricing or other horizontal restraints that are related to the products of an otherwise legitimate joint venture are per se illegal, the opinion is inconsistent with *Broadcast Music* and other subsequent decisions by this Court that have repudiated the initial suspicion of joint ventures that reached its apex with this Court's 1972 decision in *United States* v. *Topco Associates*, 405 U.S. 596 (1972), three years after *Citizen Publ'g* was decided. *See Augusta News*, 269 F.3d at 48 (noting that, notwithstanding *Topco*, "it is [now] commonly understood that per se condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture"); *Rothery Storage*, 792 F.2d at 224-29 (noting that *Topco*'s per se condemnation of all horizontal restraints, even if they are ancillary to a partnership or joint venture, had been overruled by this Court's decisions in *Broadcast Music*, *National Collegiate Athletic Assn.* and *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985)).

court acknowledged that the joint venture consisted of "local distributors who were at least potential rivals," and that by combining to seek regional customers the local distributors "might be viewed as acting through [the joint venture] to 'agree' on up-front payments to the buyers." *Id.* at 48. Nonetheless, the court held that this could not be deemed conduct that was per se illegal because "it is a standard form of joint venture for local firms to combine to provide offerings . . . that none could as easily provide by itself, *and a joint venture often entails setting a single price for the joint offering*." *Id.* (emphasis added). A joint venture's price setting could be found unlawful in some circumstances, the court concluded, but only under the rule of reason standard, which the plaintiff in *Augusta News* (like plaintiffs here) did not even attempt to satisfy. *Id.*

The Eleventh Circuit reached the same conclusion in *National Bancard Corp.* v. *Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986). There, the plaintiff alleged that Visa (essentially a joint venture comprised of member banks) had violated Section 1 of the Sherman Act "by fixing certain bank credit card interchange rates." *Id.* at 593. The plaintiff argued that, because the member banks "individually can and should negotiate the interchange fee," Visa's setting of the fee "amounts to horizontal price fixing and is per se violative of Section 1 of the Sherman Act." *Id.* at 596. Relying on this Court's decision in *Broadcast Music*, the Eleventh Circuit held that the interchange fee could not be declared per se illegal but instead had to be analyzed under the rule of reason. 779 F.2d at 601-02. The court concluded that Visa's setting of the fee "must be weighed under the rule of reason" because "the restraint is 'a necessary consequence of the integration necessary to achieve [the] efficiencies'" created by the joint enterprise. *Id.* at 602 (quoting *Broadcast Music*, 441 U.S. at 21).

Although the Ninth Circuit made passing references to *Broadcast Music* and acknowledged that "joint ventures may

price their products," Pet. App. 27a, the court attempted to avoid the clear import of *Broadcast Music* by focusing on the fact that, in the Ninth Circuit's words, "the defendants here did not simply consolidate the pricing decisions within the joint ventures – they *unified* the pricing of the two brands from the time the alliance was formed by designating one individual in each joint venture to set a single price for both brands." Pet. App. 23a (emphasis in original); *see also* Pet. App. 28a ("The question is whether two former (and potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands.") (emphasis in original).

But it is wholly irrelevant to the Section 1 analysis that Shell and Texaco allegedly agreed that Equilon would set the same, rather than different, wholesale prices for the joint ventures' two brands of gasoline in the same trade area. Indeed, the Ninth Circuit's reliance on the setting of the same price for the two brands demonstrates a fundamental misunderstanding of antitrust law. This Court's precedents make plain that the actual levels of prices – whether they are high or low, reasonable or unreasonable, the same or different – are irrelevant to the legality of an agreement concerning them. *See Catalano*, 446 U.S. at 647 ("It is no excuse that the prices fixed are themselves reasonable."); *Trenton Potteries Co.*, 273 U.S. at 397-98 (reasonableness of price set by agreement is irrelevant).[12]

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[12] Thus, for example, and contrary to the analysis by the Ninth Circuit below, the Court in *Broadcast Music* did *not* engage in any inquiry concerning the necessity for the specific prices the association there set for its blanket licenses. The Ninth Circuit's scrutiny of the *specific prices* Equilon set for its products, as a basis for determining whether the *per se* rule applied, is also at odds with cases from other Courts of Appeals. The First Circuit in *Augusta News* and the Eleventh Circuit in *National Bancard* analyzed only whether jointly establishing some price (whatever that price might be) could be condemned as per se illegal. Neither suggested that

It would be just as anti-competitive (and therefore just as much per se illegal price-fixing) for two competitors to agree that one will charge $2.00 for its product while the other charges $1.00 as for them to agree both to charge $1.50 (or any other price). Indeed, it would be equally anti-competitive and illegal for them to agree to formulas that each would use to calculate their prices. Thus, if it were per se illegal for joint venture partners to agree to charge the *same* price for two joint venture products, it would equally be per se illegal for them to agree to charge two *different* prices for those products or even to agree to the formulas that would be used to calculate the prices of each. Notwithstanding the Ninth Circuit's hollow assurance, it would no longer be true under that court's holding that "joint ventures may price their products." *See* Pet. App. 27a.

C. The Ninth Circuit Misapplied The Ancillary Restraints Doctrine To This Case.

As demonstrated above, the decision to unify the pricing of Equilon's products did not reduce competition and therefore did not constitute "price fixing" as this Court has defined that term for purposes of Section 1 of the Sherman Act. Assuming otherwise, however, the Ninth Circuit held that "the issue . . . is whether the price fixing is 'naked' (in which case the restraint is [per se] illegal) or 'ancillary' (in which case it is not)." Pet. App. 16a. Under the ancillary restraints doctrine, "some agreements which restrain competition may be valid if they are 'subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.'" *Los Angeles Mem'l Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984) (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 797-98 (1965)), *cert.*

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the specific level of those prices would be relevant to the Section 1 analysis.

denied, 469 U.S. 990 (1994).[13] Thus, according to the Ninth Circuit, "we must . . . decide whether the defendants' conduct . . . is reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 21a; *see also* Pet. App. 22a ("whether the *per se* rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded.") Purporting to apply this standard, the Ninth Circuit held that Shell and Texaco had not demonstrated the pricing decision was "ancillary" rather than "naked" and that the decision might therefore be per se illegal. Pet. App. 28a.

The Ninth Circuit's application of the ancillary restraints doctrine to this case was without foundation in law or common sense. Courts have regularly applied the ancillary restraints doctrine to agreements respecting the conduct of joint venture participants *outside* the scope of the joint venture, but not to restraints on a joint venture's *own* conduct concerning its *own* products.

The alleged agreement here between the owners of a concededly efficiency-enhancing joint venture to unify the pricing of the separately-branded products made and sold by the joint venture was not collateral to the joint venture, but integral to it. In that circumstance, the ancillary restraints doctrine does not even come into play, because the fundamental Section 1 principles explained above compel the threshold conclusion that, if Section 1 applies at all, the agreement is not per se illegal. Even if it were proper to apply the ancillary restraints doctrine here, however, that doctrine would likewise compel the conclusion that the per se

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[13] *See also Rothery Storage*, 792 F.2d at 224 ("The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose.").

rule is inapplicable.

In *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U. S. 211 (1899), then Judge (later Chief Justice) Taft introduced the ancillary restraints doctrine into antitrust law. As examples of these types of "ancillary" or "subordinate and collateral" restraints, Judge Taft identified the following:

> [A]greements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time to [sic] service.

Id. at 281. Each of these types of restraint involves a restriction on competition *outside* the four corners of any collaborative business. That is, each involves competition that, but for the restraint in question, would have continued to exist notwithstanding the formation of the collaborative venture or other contract between the parties – not an aspect of the operation of a collaborative business itself.

The same is true of the joint venture restraints that this Court addressed in *National Collegiate Athletic Assn.*, 468 U.S. 85 (1984). There, the Court invalidated a National Collegiate Athletic Association rule that limited the number of football games each school could televise and essentially fixed the price the networks paid to televise each game. *Id.* at 105-07, 113, 120. Neither the formation nor operation of the NCAA itself involved or required any such restraint; to the contrary, the television rules were adopted decades after the

NCAA was formed and began operations. *Id.* at 88-94. Thus, those rules restricted competition among the joint venture partners that could exist (and had existed) notwithstanding the existence of the joint venture itself. The Court did not expressly apply the "ancillary restraints" doctrine in *National Collegiate Athletic Assn.*, but its analysis closely tracked that doctrine. While recognizing that "[h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach," the Court held that the television rules were not subject to per se invalidation, because they were related (although not necessary) to the operation of a legitimate collaborative venture. *Id.* at 100-01 (noting that the case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all."). The Court nonetheless invalidated them under the rule of reason because they reduced competition that would otherwise have persisted among NCAA member schools, even after the venture was formed, and the NCAA had not proven that the rules were reasonably necessary to achieve any of the pro-competitive benefits of the venture. *Id.* at 101.

Lower federal courts have, since *Addyston Pipe*, applied the ancillary restraints doctrine to evaluate the legality of agreements among joint venture partners to restrict competition among them that would otherwise have continued to exist notwithstanding the formation of the joint venture itself. The courts in these cases applied the rule of reason to restraints that were arguably related to the operation of the joint venture, even if the restraints would have been subject to per se condemnation outside the joint venture context. For example, members of a credit card joint venture have been allowed to attempt to demonstrate the reasonable necessity, under the ancillary restraints doctrine, of an agreement not to issue competing credit cards. *See United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004). Joint venturers in the

construction and operation of a building to house adjoining retail stores have been allowed to defend, under the ancillary restraints doctrine, an agreement not to sell competing goods within the building. *See Polk Bros.*, 776 F.2d 185.[14] Members of a joint venture among moving companies have been allowed to show the reasonable necessity of a prohibition on the use of the joint venture's equipment to provide competing services. *Rothery Storage*, 792 F.2d 210.[15] And, a prohibition on member banks issuing rival

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[14] *Polk Bros.* involved a horizontal restraint on competition that would have been deemed illegal per se outside the context of a legitimate joint venture, since it involved two competitors agreeing not to compete with one another in the sale of specified products from their adjoining stores. *Id.* at 187. The Seventh Circuit rejected the district court's condemnation of this restraint as illegal per se because the restraint was ancillary to a bona fide joint venture between the two companies. The court stated: "A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote." *Id.* at 188-89. The restraint at issue in *Polk Bros.* was part of a legitimate joint endeavor – namely, the construction of adjoining stores offering complementary lines of products for the home – and the restraint promoted the success of the venture because without it the two companies would not have entered into the venture in the first place, given the legitimate "free riding" concerns that existed there. *Id.* at 190. The court therefore applied the rule of reason. *Id.*

[15] In *Rothery Storage*, the court confronted a rule imposed by Atlas (a network of independent moving companies that the court likened to a "complex partnership") which prohibited Atlas affiliates from handling interstate carriage for their own accounts as well as for Atlas. *Id.* at 212-13. The court acknowledged that Atlas's policy "may be characterized as a boycott, or a concerted refusal to deal," since it "involves an agreement not to deal with those who do not comply with Atlas' policy." *Id.* at 215. But the court held that this restraint on competition could not be deemed illegal per se because it was ancillary to an efficiency-enhancing joint enterprise, "in the

credit cards had to be tested under the rule of reason, not the per se rule.[16] *See Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 485 F.2d 119 (8th Cir. 1973). In each instance, the challenged agreement restricted competition that could and would otherwise have continued to exist notwithstanding the formation and operation of the joint venture itself.[17]

The ancillary restraints doctrine has no application where, as here, the challenged restraint is an integral part of the operation of the joint venture itself and does not in any way

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sense that it serves to make the main transaction more effective in accomplishing its purpose." *Id.* at 224.

[16] In *Worthen*, the Eighth Circuit reversed the district court's holding that a BankAmericard bylaw prohibiting member banks from issuing rival MasterCharge cards could be declared *per se* illegal as a form of group boycott. The court held that, although group boycotts are "[a]mong those types of agreements which have been classified as per se violations," the challenged bylaw had to be "tested at trial under the 'rule of reason'" because it was a restraint ancillary to the joint venture's operation. 485 F.2d at 124, 125; *see also SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 964-65 (10th Cir. 1994) (upholding, under rule of reason, similar Visa bylaw prohibiting member banks from issuing Discover cards, and noting that this Court's cases have "clarif[ied] the inappropriateness of automatically invoking *per se* scrutiny of a joint venture's alleged antitrust violation").

[17] Under the ancillary restraints doctrine, lawyers dissolving their partnership have been required to prove the reasonable necessity of territorial restrictions on advertising by the former partners following dissolution. *See Blackburn* v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995). And this Court has said that "[t]he classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 (1988). In those situations, the challenged restraint would necessarily relate to competition beyond the confines of any collaborative business, because no such business would exist at the time that the restraint was effective.

restrict competition outside the joint venture.[18] In this circumstance, the only relevant antitrust question is whether the *formation* of the joint venture is lawful under Section 1 of the Sherman Act and Section 7 of the Clayton Act. If – as here – it is, decisions by the joint venture partners concerning the joint venture's own business cannot be per se illegal under Section 1, without regard to the ancillary restraints doctrine.

Moreover, even if substantive scrutiny were appropriate here under the ancillary restraints doctrine, any Shell and Texaco agreement about the pricing of Equilon's two brands of gasoline would unquestionably qualify as an ancillary restraint that must be evaluated under the rule of reason, not the per se rule. Just as setting a price for the blanket license in *Broadcast Music* was a "necessary consequence" of the joint venture there, 441 U.S. at 21, joint setting of prices for Equilon's products was a necessary consequence of the formation of the venture. *See National Bancard*, 779 F.2d at 602; *see, e.g.*, XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2132c, at 179-80 (2d ed. 2005) ("[The] joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold. When joint owners are also competitors, the result is literally 'price fixing,' but it is a form of price fixing that should, when bona fide, be examined under the rule of reason."). As such, it is beyond dispute that any pricing decisions at issue were at least "subordinate and collateral" to a legitimate joint venture and therefore subject, at most, to analysis under the rule of reason.

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[18] For that reason, the Court need not address the circumstances under which a joint venture restraint that is not integral to operation of the venture itself and restricts competition *outside* the venture may nevertheless be subject to the rule of reason, rather than the per se rule.

III. APPLICATION OF THE PER SE RULE HERE WOULD CHILL THE FORMATION OF EFFICIENT, PRO-COMPETITIVE JOINT VENTURES.

Joint ventures and other similar cooperative enterprises are an increasingly common form of business organization. Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 873 (1994) (noting that "the number of new strategic alliances in the United States has nearly doubled in each of the last ten years"). Joint ventures offer companies the ability to reap the efficiency-enhancing benefits of joint activity in circumstances where a complete merger of all of their operations is either undesirable or infeasible. *Antitrust Guidelines For Collaboration Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) § 2.1 ("consumers may benefit from competitor collaborations in a variety of ways," including "allow[ing] [a joint venture's] participants to better use existing assets" – for instance, by facilitating "the attainment of scale or scope economies beyond the reach of any single participant"); XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2104a, at 40 (2d ed. 2005) ("Joint ventures are presumably good things because they reduce firms' costs of enabling the firms to do things that they could not otherwise do *or to do them better*.") (emphasis added).

Application of the per se rule here would chill legitimate and beneficial economic activity by raising the specter of per se liability for efficiency-enhancing joint ventures that unite formerly competing products under common ownership and pricing control. Indeed, if so basic an activity as pricing products sold by a single, concededly legitimate, integrated joint venture were deemed not just subject to Section 1, but potentially per se illegal, it is hard to understand what actions by the joint venture could *not* be in question. This is a significant danger created by the Ninth Circuit's

unprecedented extension of the per se rule. *See Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("false condemnations" under the antitrust laws "are especially costly, because they chill the very conduct the antitrust laws are designed to protect") (internal quotation marks omitted). Businesses cannot risk "the severe sting of antitrust liability" (Pet. App. 34a (Fernandez, J., dissenting)) posed by the treble damages and attorneys' fees available under Section 1 of the Sherman Act.

As this Court implicitly recognized in *Trinko*, this is properly the concern of the judiciary in the first instance. *Cf. Trinko*, 540 U.S. at 410-12. The Ninth Circuit disclaimed any concern or responsibility for the real-life effects of its ruling, asserting that "it does not matter whether the particular application of the *per se* rule appears inefficient or unfair," and that "if [this] individual application of the *per se* rule is economically inefficient, that concern must be addressed to Congress, not the judiciary."[19] Pet. App. 13a, 28a-29a. These comments reflect a fundamental misunderstanding of the derivation of the per se rule and of the federal courts' obligation to define the proper scope of that rule. The Sherman Act does not provide that any conduct is "per se" illegal. Rather, the Sherman Act provides that "every"

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[19] In so stating, the Court of Appeals ignored the fact that the agencies charged by Congress with enforcing these laws have in fact already concluded that application of the per se rule is inappropriate in these circumstances. In their recently promulgated *Antitrust Guidelines For Collaboration Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000), the Antitrust Division of the Department of Justice and the Federal Trade Commission stated: "If . . . participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, *even if it is of a type that might otherwise be considered per se illegal*." *Id.* at § 3.2.

contract, combination or conspiracy "in restraint of trade" is illegal. 15 U.S.C. § 1. This Court has repeatedly said, however, that only "unreasonable" restraints are illegal. *E.g.*, *State Oil Co.*, 522 U.S. at 10 ("Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints.") The per se rule is a *judicial creation* – a radically abbreviated means, to be used only in extraordinary situations, to determine that a particular restraint is "unreasonable." Federal courts have an obligation to ensure that the rule is not applied in a manner that is either unfair or inefficient. *See generally*, *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 459-60 (1986). This Court should reverse the judgment of the Ninth Circuit, which is based on an application of the per se rule that is not only unfair and inefficient but also contrary to sound antitrust policy and prior decisions of this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TEXACO INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER TEXACO INC.

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QUESTION PRESENTED

Whether it is *per se* illegal concerted action under Section 1 of the Sherman Act for an economically integrated joint venture to set the selling price of its own products.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit were Fouad N. Dagher; Bisharat Enterprises, Inc.; Alfred Buczkowski; Esequiel Delgado; Mahwash Farzaneh; Nasser El-Radi; G.G.&R. Petroleum, Inc.; H.J.F. Inc.; Kaleco Co.; Carlos Marquez; Sami Merhi; Edgardo R. Parungao; Ron Abel Serv. Center, Inc.; Gullermo Ramirez; Jerry's Shell Serv. Center, Inc.; Leopoloo Ramirez; Nazar Sheibaini; Sitara Management Corporation; Tinsel Enterprises, Inc.; Quang Truong; Steven Ray Vezerian; Los Feliz Shell, Inc.; Nassim Hanna; Saudi Refining, Inc.; Texaco Inc.; Shell Oil Company; Motiva Enterprises LLC; Equilon Enterprises LLC; Equiva Trading Company; and Equiva Services LLC.

Pursuant to Supreme Court Rule 29.6, petitioner Texaco Inc. states that it is an indirectly wholly owned subsidiary of Chevron Corporation. Chevron Corporation has no parent company, and no publicly held company owns 10% or more of Chevron Corporation's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 1

A. The Joint Ventures 2

B. This Lawsuit 5

C. The Ninth Circuit's Divided Decision 6

SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. A JOINT VENTURE ENTITY'S OPERATION OF ITS OWN BUSINESS IS SINGLE FIRM CONDUCT THAT IS NOT SUBJECT TO SECTION 1 OF THE SHERMAN ACT. 11

A. This Court And Others Have Recognized That An Integrated Joint Venture Is Regarded As A Single Firm When Conducting Its Own Business. 11

B. Sound Antitrust Principles Support Recognizing Equilon As A Single Firm When It Is Operating Its Own Business. 15

C. The Ninth Circuit's Reasons For Treating Equilon's Daily Operation As An Ongoing Conspiracy Are Groundless. 23

TABLE OF CONTENTS (cont'd)

Page

II. THE NINTH CIRCUIT'S RULING THAT *PER SE* TREATMENT MAY BE APPLIED CONFLICTS WITH THIS COURT'S DECISIONS AND BASIC ANTITRUST PRINCIPLES. 26

A. This Court's Precedents Reject *Per Se* Treatment For Restraints Of This Type. 27

B. The Ninth Circuit's "Necessity" Standard Is Unfounded. 32

CONCLUSION 37

TABLE OF AUTHORITIES

Page

Cases

Addamax Corp. v. Open Software Foundation,
152 F.3d 48 (1st Cir. 1998)....13

Albrecht v. Herald Co.,
390 U.S. 145 (1968)....27

Arizona v. Maricopa County Med. Soc'y,
457 U.S. 332 (1982)....passim

Augusta News Co. v. Hudson News Co.,
269 F.3d 41 (1st Cir. 2001)....29

Broad. Music, Inc. v. CBS, Inc.,
441 U.S. 1 (1979)....passim

Business Elecs. Corp. v. Sharp Elecs. Corp.,
485 U.S. 717 (1988)....27, 34

Cal. Dental Ass'n v. FTC,
526 U.S. 756 (1999)....32

Chicago Prof. Sports Ltd. P'ship v. NBA,
95 F.3d 593 (7th Cir. 1996)....13

Citizen Publ'g Co. v. United States,
394 U.S. 131 (1969)....31

Continental T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977)....27, 33

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984)....passim

Fraser v. Major League Soccer, L.L.C.,
284 F.3d 47 (1st Cir. 2002)....29

FTC v. Borden Co.,
383 U.S. 637 (1966)....18

TABLE OF AUTHORITIES (cont'd)

Page

FTC v. Ind. Fed'n of Dentists,
476 U.S. 447 (1986).....20, 27

Mt. Pleasant v. Associated Elec. Coop.,
838 F.2d 268 (8th Cir. 1988).....13

Nat'l Bancard Corp. v. Visa U.S.A.,
779 F.2d 592 (11th Cir. 1986).....29

Nat'l Soc'y of Prof'l Eng'rs v. United States,
435 U.S. 679 (1978).....21, 27

NCAA v. Bd. of Regents,
468 U.S. 85 (1984).....passim

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,
472 U.S. 284 (1985).....20, 25, 29

Nurse Midwifery Assocs. v. Hibbett,
918 F.2d 605 (6th Cir. 1990).....13

Polk Bros., Inc. v. Forest City Enters.,
776 F.2d 185 (7th Cir. 1985).....22, 35

Rothery Storage & Van Co. v. Atlas Van Lines,
792 F.2d 210 (D.C. Cir. 1986).....35, 36

State Oil Co. v. Khan,
522 U.S. 3 (1997).....27, 32

Timken Roller Bearing Co. v. United States,
341 U.S. 593 (1951).....31

United States v. Addyston Pipe & Steel Co.,
85 F. 271 (6th Cir. 1898),
aff'd as modified, 175 U.S. 211 (1899).....34

United States v. Penn-Olin Chem. Co.,
378 U.S. 158 (1964).....12

TABLE OF AUTHORITIES (cont'd)

Page

United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004) 12

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Statutes and Codes

15 U.S.C. § 1 ..... passim

15 U.S.C. § 18 ..... 8, 11, 12

28 U.S.C. § 1254(1) 1

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Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701 (1998) 14, 23

In re Chevron Corp., 2002 WL 10629 (F.T.C. Jan. 2, 2002) 4

In re Shell Oil Co., 125 F.T.C. 769 (1998) 4

In re Standard Oil Co., 49 F.T.C. 923 (1953) 18

TABLE OF AUTHORITIES (cont'd)

Page

Jon G. Shepherd, Editor's Note, *Symposium: Antitrust Scrutiny of Joint Ventures*, 66 Antitrust L.J. 641 (1998) 22

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Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 Vanderbilt L. Rev. 1753 (1994) 15

VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) ..... passim

W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful*, 19 Antitrust 52 (Spring 2005) 17, 26

XI Herbert Hovenkamp, *Antitrust Law* (2d ed. 2005) 35, 36

XIII Herbert Hovenkamp, *Antitrust Law* (2d ed. 2005) 21, 22

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 2a-33a) is reported at 369 F.3d 1108. The district court's opinions (Pet. App. 34a-69a) are unreported.[1]

JURISDICTION

The court of appeals' judgment was entered on June 1, 2004. Petitioner's timely petition for rehearing and rehearing *en banc* was denied on September 15, 2004. Pet. App. 1a. The petition for writ of certiorari was filed on December 14, 2004 and was granted on June 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.

STATEMENT OF THE CASE

This case involves the right of a legitimate joint venture to set the selling price of its own products. The joint venture in question is Equilon, which was formed when Shell Oil Company and Texaco Inc. combined and fully integrated their downstream gasoline refining and marketing businesses. No question is raised as to the validity of Equilon's formation or Equilon's right to refine and sell gasoline. Equilon's creation was extensively reviewed, and approved, by federal and state antitrust regulators, and the courts below acknowledged the voluminous record establishing Equilon's procompetitive, efficiency-enhancing justifications.

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[1] References to Pet. App. are to the appendix to Texaco's certiorari petition, No. 04-805.

Yet the Ninth Circuit ruled that Equilon's act of pricing its own gasoline is subject not only to antitrust scrutiny but to *per se* condemnation. No conceivable antitrust policy is served by this judicial intrusion into a valid business' internal decision-making. This Court should remove the cloud over legitimate joint venture activity created by the Ninth Circuit's decision by ruling that a legitimately formed joint venture entity has the same right under the antitrust laws as any other single entity to conduct its business without fear of attack under Section 1 of the Sherman Act and possible *per se* condemnation.

A. The Joint Ventures

In 1996, Shell and Texaco began discussing the formation of a new company to consolidate their domestic gasoline refining and marketing operations. JA 75 (¶ 33). After months of study, they concluded that the consolidation could result in reduced costs and increased efficiencies that would save approximately $800 million per year. JA 76 (¶¶ 36-39). A single new company would allow refineries located close together to share inputs and transportation costs, allow increased use of company-owned pipelines, and permit more effective advertising and sales promotion. Pet. App. 51a-52a. As the Ninth Circuit recognized, "[t]here is a voluminous record documenting the economic justifications for creating the joint ventures." *Id.* at 4a.

In 1998, the discussions culminated in the complete integration of the gasoline refining and marketing businesses of Shell and Texaco in the United States. The assets that Shell and Texaco contributed included twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees. JA 77 (¶ 48). The new businesses formed in the

integration (named Equilon and Motiva[2]) also received the exclusive rights to market gasoline in the United States under the Shell and Texaco brands, subject only to certain "Brand Management Protocols" that protected the value of the Shell and Texaco brands (which Shell and Texaco continued to use independently outside the United States). JA 77-78 (¶¶ 53-56).[3]

The result of this transaction was that both Shell and Texaco exited the gasoline refining and marketing business in the United States. JA 76 (¶ 42), 77 (¶ 45); Pet. App. 5a ("The creation of the alliance ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline."). They transferred the relevant assets to the joint ventures and signed non-competition agreements that prohibited them from competing with the joint ventures. JA 78 (¶¶ 58-59). Shell and Texaco thus became mere owners of the new entities that had the sole rights to refine and market Shell and Texaco gasoline. The formation of these companies was effectively a merger of Shell's and Texaco's former gasoline refining and marketing businesses, and Shell and Texaco stood in the same relation to the new entities as do shareholders to a corporation.

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[2] Because Texaco had previously formed a venture with Saudi Refining, Inc. ("SRI") that included its refining and marketing assets in the eastern half of the country, JA 72 (¶ 4), this new combination took the form of two separate ventures—one (Motiva) covering the eastern part of the country and including SRI, and the other (Equilon) involving just Shell and Texaco covering the western half of the United States. JA 76-77 (¶¶ 43-47).

[3] The companies retained their upstream and foreign operations as well as operations unrelated to refining and marketing gasoline, such as their worldwide chemical, aviation and marine fuels businesses. JA 77 (¶¶ 49-50), 121-22 (¶ 42).

Reflecting the complete integration of their former businesses, the profits Shell or Texaco could earn from the entities no longer depended on the quantity of any specific brand the entities sold. Instead, Shell's and Texaco's gains or losses depended on the overall profitability of the entities, and were divided in proportion to the assets each company contributed at formation. JA 76 (¶ 43), 77 (¶ 47). Thus, neither Shell nor Texaco had a specific interest in the price charged for any particular brand sold by the ventures. At some point after their formation, the entities began to charge the same price in any trade area for both Shell-branded and Texaco-branded gasoline. JA 131 (¶ 63).

The Federal Trade Commission and the attorneys general of four western states comprehensively reviewed the transaction for compliance with the antitrust laws. JA 116-17 (¶¶ 26-28). Recognizing that the ventures would operate as a single entity in the relevant markets, the FTC evaluated the ventures' formation "as if it were a complete merger" using the same standard the FTC applies when evaluating mergers.[4] It identified competitive concerns in certain markets and required that Shell and Texaco agree to divest certain assets to remedy those concerns. The parties entered a consent decree embodying these divestiture requirements—a consent decree that the FTC concluded

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[4] *See, e.g., In re Shell Oil Co.*, 125 F.T.C. 769, 774, 775, 776, 777 (1998) (recognizing that formation of the ventures would "eliminate direct competition" between Shell and Texaco); FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868, 67,871 (1997) (observing that Equilon's formation "will reduce the six competitors to five"); *In re Chevron Corp.*, 2002 WL 10629 (F.T.C. Jan. 2, 2002) (Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson) ("[T]he Commission evaluated the formation of the Alliance as if it were a complete merger of the downstream operations of Texaco and Shell. . . . In all subsequent oil merger investigations undertaken by the Commission, we have considered Texaco and Shell to be a single entity when evaluating downstream market concentration.").

"alleviate[d] the alleged competitive concerns arising from the Joint Venture." FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868, 67,869 (1997). Similar consent decrees were entered with the four investigating states. JA 117 (¶ 28). Consistent with the nature of the ventures as fully integrated entities that would market gasoline as well as produce it, none of the consent decrees imposed any restraint on the ventures' pricing of the Shell and Texaco brands.

B. This Lawsuit

In 1999, service station dealers who bought gasoline from Equilon filed this lawsuit under Section 1 of the Sherman Act. Without challenging Equilon's legitimacy or its right to produce and sell gasoline, the plaintiffs alleged that it was *per se* illegal price-fixing for Equilon to charge the same price for the Shell brand as for the Texaco brand.[5] The plaintiffs (understandably) disavowed any attempt to prove a violation of Section 1 under a "rule of reason" analysis, Pet. App. 7a, 47a, which would have required that they demonstrate that Equilon's pricing decision actually had anticompetitive effects in some relevant market. Instead, they sought to prevail solely on the basis that Equilon's pricing of its own gasoline could be held unlawful without any analysis of its actual competitive impact.

The district court granted the defendants' motion for summary judgment. The court concluded that Equilon was bona fide and could not reasonably be viewed as a sham designed to disguise an ulterior anticompetitive purpose. *Id.* at 54a-66a. The district court further ruled that it did not violate the antitrust laws for this bona fide entity to price its own products "[l]ike any other business." *Id.* at 63a. The

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[5] The plaintiffs asserted a similar claim against Motiva, but the district court dismissed that claim, and the Ninth Circuit affirmed, because none of the plaintiffs had purchased from Motiva. *See* Pet. App. 34a-45a; *id.* at 10a-12a. The only claims at issue therefore relate to Equilon.

court found it irrelevant that Equilon charged the same price for the Shell and Texaco brands. As the court explained: "Whether Equilon and Motiva charge the same or different prices for both brands, each literally 'fixes' a price where [Shell and Texaco] formerly set prices independently. Yet they and every other joint venture must, at some point, set prices for the products they sell." *Id.* at 52a-53a. A ruling that it is illegal for a joint venture to fix the prices of its various brands would "act as a *per se* rule against joint ventures between companies that produce competing products." *Id.* at 54a.

C. The Ninth Circuit's Divided Decision

In a split decision, the Ninth Circuit reversed. The majority (Reinhardt and Rawlinson, JJ.) held that Equilon's decision to charge the same price for the Shell and Texaco brands was *per se* illegal unless the defendants could show that that particular pricing decision was "reasonably necessary" to achieve the anticipated efficiencies that led to Equilon's creation. Pet. App. 21a.

The majority acknowledged that, "for some purposes at least," joint ventures that consist of a true pooling of assets and sharing of risks are to be considered "'single firms competing with other sellers in the market.'" Pet. App. 16a (quoting *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982)). The majority further acknowledged that Equilon involved such a "collective assumption of risk and resource pooling." Pet. App. 5a. But the majority concluded that Equilon's integrated nature did not prevent applying Section 1 to Equilon's pricing of its own products because Shell and Texaco had supposedly agreed "in advance" that, once Equilon was formed, it would charge the same price for each brand. *Id.* at 19a n.11. To the majority, this meant that the pricing decision "was not a decision made by a single economic entity—it was a decision made by competitors." *Id.*

Applying Section 1, the majority concluded that the legality of Equilon's pricing depended on whether "setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors . . . is reasonably necessary to further the aims of the joint venture." *Id.* at 21a. If not, the court held, it could be deemed naked price-fixing, and thus *per se* illegal.

Applying its narrow focus on Equilon's actual pricing strategy, the majority concluded that the evidence did not establish the requisite necessity because, in the court's view, the defendants did not view setting the same price for the two brands as critical to the efficiencies and anticipated cost savings from Equilon's creation. *Id.* at 23a. The court rejected the argument that businesses must have the freedom to choose the prices at which they will sell their products without being second-guessed by the courts. It asserted that that argument "proves too much" because it would permit companies to "create joint ventures as fronts for price-fixing"—although the court did not suggest that Equilon was a sham or anything other than a bona fide single entity merely pricing the products it produced, owned and sold. *Id.* at 26a. The majority dismissed as irrelevant whether Equilon's pricing strategy had any actual competitive consequences. Having labeled Equilon's price-setting as "price-fixing," the majority held that the *per se* rule forbids any such inquiry.

Judge Fernandez dissented. He began with the undisputed premise that there was "no doubt that each of the new entities is a true, bona fide, economically integrated joint venture." *Id.* at 29a. He concluded that "nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products." *Id.* at 31a-32a. Judge Fernandez rejected the majority's assertion that liability depended on whether the defendants could show that

Equilon's specific pricing strategy was "essential [or] 'reasonably ancillary to the legitimate cooperative aspects of the venture.'" *Id.* at 31a (citation omitted). Instead, it was enough that Equilon needed "to price its own goods." *Id.* at 32a. As he stated, "[w]hat could be more integral to the running of a business than setting a price for its goods and services?" *Id.* Because Equilon was thus a "separate entity" entitled to price its own products, it was irrelevant that it "decided to price them the same, as any other entity could." *Id.* at 31a, 32a. The result of the majority's ruling, Judge Fernandez concluded, was that bona fide joint ventures would be subject "to the severe sting of antitrust liability" simply for conducting themselves on the same basis as any other "true business." *Id.* at 32a.

SUMMARY OF ARGUMENT

1. The decision below is plainly wrong. Section 1 of the Sherman Act reaches only concerted action between separate entities. It does not reach the conduct of a single firm. Here, Equilon was a legitimately formed and valid venture between Shell and Texaco. Its formation eliminated all competition between them in the relevant market. As a result, Equilon's operation of its own business does not constitute the "sudden joining of independent sources of economic power" about which Section 1 is concerned. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

Equilon's *formation* was such a joining of independent resources to which Section 1 (and Section 7 of the Clayton Act) surely applied. And that formation was carefully reviewed and approved by the FTC and several states. But once Equilon was legitimately formed, Equilon's conduct—regardless of whether decided upon by its owners, managing committee, or the individuals appointed to operate the business on a day-to-day basis—was single firm conduct not subject to Section 1. This Court's decisions, lower court decisions and the leading antitrust commentators agree.

Any other rule would be nonsensical, seriously disruptive at a minimum, and a significant deterrent to the procompetitive formation of efficiency-enhancing businesses. It would require courts to substitute their own managerial judgements for those of the firm's owners on essentially every aspect of the venture's operation. Avoiding this kind of judicial second-guessing of a company's daily operation was a principal reason behind Congress' decision to restrict Section 1's application to concerted action of separate entities. The Ninth Circuit's ruling subverts that fundamental purpose.

Recognizing Equilon's status as a single firm would not immunize joint ventures from antitrust scrutiny. Agreements to form a venture, and any accompanying restraints on non-venture conduct, would remain fully subject to antitrust review. Similarly, joint ventures are subject to the same restrictions as any other business, including scrutiny under Section 1 for any concerted action with other entities and under Section 2 for monopolization or attempted monopolization. Here, no such issues are presented. No challenge is made to Equilon's formation or to any restraints on non-venture conduct. The only issue is Equilon's operation of its own validly formed business, which is not subject to Section 1.

2. Even if Section 1 were applicable, it is inconceivable that Equilon's pricing of its own product could be condemned as *per se* illegal. The rule of reason is the presumptive standard under Section 1 and the exception to that standard—the *per se* rule—is reserved for restraints that have been shown by considerable experience to be plainly anticompetitive and without any redeeming value.

A legitimate joint venture's pricing of its own product cannot possibly meet that standard. Even where (unlike this case) the companies forming a joint venture continue to separately compete in the relevant market, this Court has repeatedly rejected application of the *per se* rule to restraints

that accompany a valid, efficiency-enhancing joint venture. Here, where Shell and Texaco were no longer competitors in the relevant market and thus no agreement between them as to Equilon's prices could possibly have restricted competition, the notion that the *per se* rule could be proper is incomprehensible.

The ancillary restraints doctrine on which the Ninth Circuit relied is irrelevant here. That doctrine was developed to address agreements that restrain the venture participants' conduct *outside* of the venture. It has not been—and should not be—applied to subject to separate antitrust scrutiny every operational aspect of the venture's *own* business. The purpose of the doctrine is to ensure that venture participants do not use the venture as an excuse for restraining competition that would otherwise continue to exist between them. Here, the formation of the venture itself had already ended all competition in the relevant market between Shell and Texaco, so there was no otherwise independent competition that possibly could have been restrained.

Moreover, even if the ancillary restraints doctrine were applicable here, it was satisfied. As a legitimate business formed to produce and sell its own gasoline, Equilon had to set a price for that gasoline. The need for it to do so was sufficient to satisfy any standard of necessity under the ancillary restraints doctrine.

The Ninth Circuit badly misapplied basic antitrust principles to reach an unsupportable result. Because legitimate joint ventures are a critically important form of business organization in the modern world, this Court should make clear that, once properly and legitimately formed, their day-to-day business operations will not be subject to the kind of frivolous legal attack the Ninth Circuit endorsed in the decision below.

ARGUMENT

I. A JOINT VENTURE ENTITY'S OPERATION OF ITS OWN BUSINESS IS SINGLE FIRM CONDUCT THAT IS NOT SUBJECT TO SECTION 1 OF THE SHERMAN ACT.

A. This Court And Others Have Recognized That An Integrated Joint Venture Is Regarded As A Single Firm When Conducting Its Own Business.

The threshold question in any case under the Sherman Act is whether the conduct in question is that of a single firm or multiple firms. That is because "[t]he Sherman Act contains a basic distinction between concerted and independent action." *Copperweld*, 467 U.S. at 767 (internal quotation marks omitted). Section 1 "reaches unreasonable restraints of trade effected by a 'contract, combination ... or conspiracy' between *separate* entities." *Id.* at 768 (quoting 15 U.S.C. § 1) (emphasis in original). It does not reach "[t]he conduct of a single firm," which "is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Id.* at 767.

This more exacting standard for concerted action reflects Congress' judgment that concerted action carries greater competitive risk because it "represent[s] a sudden joining of two independent sources of economic power previously pursuing separate interests"—a "merging[] of resources" that "increases the economic power moving in one particular direction." *Id.* at 769, 771. By contrast, decisions within a single firm do not represent such a "merging[] of resources" and are not subject to Section 1 scrutiny, thus leaving companies free to vigorously compete without having their "every action [subjected] to judicial scrutiny for reasonableness." *Id.* at 775.

There is no question that the decision of two companies to form a joint venture is a "merging of resources" to which Section 1 applies (along with Section 7 of the Clayton Act, 15 U.S.C. § 18), just as Section 1 (and Section 7) would

apply to a complete merger of two previously independent companies. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964) (analyzing under Section 1, and under Section 7 of the Clayton Act, the formation of a joint venture to build a chemical plant); *accord* VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478a, at 318 (2d ed. 2003) ("A venture's formation results from the founders' 'agreement,' which, like any other formation agreement, can be appraised for 'reasonableness' under Section 1 of the Sherman Act.").

Similarly, if members of a joint venture agree to restrictions on their own activities outside of the venture or to other similar collateral restraints, the courts have recognized that Section 1 would apply to any such agreement. *See, e.g., United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) (applying Section 1 to judge validity of rules prohibiting Visa member banks from issuing cards of other credit card companies), *cert. denied*, 125 S. Ct. 45 (2004).

Neither circumstance is present here. The Ninth Circuit did not suggest that Equilon's formation violated Section 1. That formation decision was the subject of extensive antitrust review by the FTC and the state attorneys general, who found Equilon's formation to be lawful, conditioned on certain divestitures. *See supra*, pp. 4-5. Nor do plaintiffs challenge any collateral restraints entered into in connection with the venture. The pricing strategy at issue here applied only to Equilon's output.

Instead, plaintiffs attack the operation of Equilon's own separate business—*i.e.*, establishing a price for the products it sells. The Ninth Circuit's ruling that this could be considered concerted action is erroneous. This Court recognized in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), that a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the

market." *Id.* at 356. Thus, in such a cooperative venture, "a price-fixing agreement among the [partners] would be perfectly proper." *Id.* at 357.

This recognition of the right of an integrated venture (or its owners) to set the price of the venture's own product applies fully here. Equilon was a complete merger of the relevant businesses of the companies involved. This effective merger ended all competition in the relevant market between the founding companies, who are now in the position of shareholders of the new business. With respect to that business, the owners had a "complete unity of interest," *Copperweld*, 467 U.S. at 771, because the business' profits were divided based on the share of ownership of the business, rather than the sale of any particular brand. As Judge Fernandez correctly recognized below, as a "separate entity," Equilon was entitled to select the price for its own product "as any other entity could." Pet. App. 31a, 32a.[6]

The leading antitrust treatise makes the point clearly: where joint enterprises "are buying and selling in their own right, they can fairly be regarded as single entities whose

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[6] *See also Chicago Prof. Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (observing that the NBA may be "best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities"); *Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 276 (8th Cir. 1988) (holding that Section 1 does not apply to the pricing decisions of an electric cooperative as a purported conspiracy among its members); *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 616 (6th Cir. 1990) (recognizing that Section 1 should not apply to decisions of "former competitors operating a joint venture which competes in the market with other sellers"); *Addamax Corp. v. Open Software Foundation*, 152 F.3d 48, 52 (1st Cir. 1998) (questioning how far the theory that "the operations of the joint venture represent collaboration of the separate entities that own or control it . . . can be pressed in the case of a truly integrated enterprise whose 'owners' were no more than stockholders").

selling decisions are not 'price-fixing conspiracies' and whose buying decisions are not 'boycott conspiracies.'" VII *Antitrust Law* ¶ 1477, at 316. Thus, "[o]nce a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy." *Id.* ¶ 1478, at 325.

Other commentators agree:

> When a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity. Hence, a joint venture acts as a single entity when it purchases inputs from third parties or sets a price or output for sale to third parties of a product not sold to participants.

Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 704-05 (1998) (footnotes omitted).

Treating Equilon's operation as that of a single firm is also consistent with the approach of the Federal Trade Commission and the Department of Justice in their *Antitrust Guidelines for Collaborations Among Competitors.*[7] Those guidelines recognize that competitor collaborations should be analyzed under the same standards as a merger (which do not subject the merged entity's operation to Section 1 scrutiny) where the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market, ends all competition between the participants in that market, and lasts for a sufficiently long period. *Id.* § 1.3. The formation of Equilon falls squarely within this description. As noted above, p. 4 & n. 4, the FTC treated Equilon's formation as a merger when it conducted its

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[7] 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) (available at <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>) [hereinafter *Guidelines*].

review. And the *Guidelines* themselves use an example that is based on Equilon to illustrate a venture that should be treated as a merger. *Id.* Appendix, Example 1.[8]

B. Sound Antitrust Principles Support Recognizing Equilon As A Single Firm When It Is Operating Its Own Business.

Recognizing Equilon's status as a separate single entity when it sets the price for its own gasoline is consistent with basic antitrust principles and common sense. Section 1 is concerned with concerted action because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld*, 467 U.S. at 769. Conspiracies among such independent entities "increase market power or make possible a restraint that could not otherwise be achieved." VII *Antitrust Law* ¶ 1462b, at 194. That is not the situation here. No "independent centers of decisionmaking" existed with respect to Equilon's pricing decisions, because Equilon's owners had validly and completely ended competition between them within the United States and thus had a complete unity of interest with respect to such decisions. The "sudden joining of two independent sources of economic power previously pursuing separate interests" to which Section 1 applies, *Copperweld*, 467 U.S. at 771, occurred when Equilon was

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[8] *See also* Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 Vanderbilt L. Rev. 1753, 1787-88 (1994) ("A merger analysis is appropriate when the parties have integrated all of their existing production or marketing operations in a joint venture. Such integrations eliminate all competition between the parties in the relevant market. As in a merger, a single entity (the joint venture) takes the place of the former competitors in the market. These arrangements have the same economic impact as an acquisition of one partner's business by the other, and thus they should be analyzed in the same manner.").

formed, not when it later conducted its validly formed business.

Nor did Equilon's pricing decisions increase any market power beyond that already validly existing or impose any new restraint. The pricing decisions at issue related only to Equilon's own products and not to any separate products of Shell or Texaco. Indeed, because Shell and Texaco had exited the relevant market, there were no separate products of those companies to which the pricing decisions could apply. All that occurred here was a decision regarding Equilon's own internal business. Such "[c]oordination within an otherwise lawful enterprise does not create additional market power or facilitate a restraint" in violation of Section 1. VII *Antitrust Law* ¶ 1462b, at 194.

Once the formation of a venture is reviewed and found valid under the antitrust laws, no legitimate purpose is served by separately scrutinizing each of the venture's operational decisions. Where (as here) the venture is formed to both produce and sell its own gasoline, antitrust scrutiny of the venture's formation necessarily includes considering whether competition may be harmed by the exercise of that pricing power. The antitrust regulators and the courts (if the formation is challenged) evaluate the degree of market power the combined entity will hold and its ability to affect prices. *See supra,* pp. 4-5. In this case, that review resulted in the regulators requiring that the owners divest certain assets in markets where the regulators concluded that the combined entity's unified operation could produce anticompetitive results. *Id.* That review having been completed, and no challenge now being made to Equilon's formation as a production *and* marketing venture, no antitrust purpose is served by subjecting to separate antitrust scrutiny Equilon's exercise of the operational decision-making power inherent in its valid formation. The conduct here was the competitive equivalent of General Motors (itself the product of various business combinations in the past) deciding to set the same price for its Chevrolet Malibu and Pontiac Grand Am. No

one would seriously suggest that GM's pricing decisions should be analyzed as an ongoing conspiracy between its previously independent parts. No reason exists for any different rule here.[9]

In addition to not furthering any valid antitrust purpose, applying Section 1 to an integrated venture's ongoing operation is simply unworkable. Under the Ninth Circuit's rule, virtually every operational decision of any joint venture would be subject to antitrust scrutiny, including such routine (and necessary) decisions as what or how much to produce, or what supplies to purchase and from whom. Courts and juries would be called upon to "substitute their managerial judgments for those of the firm" and engage in "inconvenient, if not impossible, judicial review of the venture's day-to-day operations at the suit of disappointed suppliers and others." VII *Antitrust Law* ¶ 1478c, at 325, 326. *See also Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (recognizing that courts are "ill-suited" to "act as central planners, identifying the proper price, quantity and other terms of dealing" of a single firm).

The Ninth Circuit's analysis here illustrates the problem. In concluding that Equilon's pricing decisions could be found illegal, the court asserted that "[n]ormally" businesses

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[9] *See, e.g.*, W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful*, 19 Antitrust 52, 55 (Spring 2005) ("When a court evaluates the lawfulness of a legitimate horizontal joint venture under the rule of reason, it is necessarily evaluating whether the consolidation of the price-setting functions of former rivals lessens competition. There is no reason for the courts to then evaluate this question a second time, viewing the consolidation of the price-setting functions as a separate restraint of trade . . . ."); VII *Antitrust Law* ¶ 1478b1, at 320 ("because it would be senseless for antitrust law to take away with one hand what it gives with the other, approval [of a venture's formation] means that the subsequent realization of that which was foreseeable and judged reasonable at the time of creation must also be legal").

will consider a variety of factors in pricing their products and that it "seems likely" that an "independent" analysis would result in a "rational decision to sell the different brands at different prices." Pet. App. 23a. How a court could believe itself competent even to engage in such analysis, or on what basis it could reach such a conclusion, is hard to fathom. If this is illustrative of the kind of second-guessing by antitrust courts or lay juries that the Ninth Circuit's approach would dictate—with respect to not just pricing decisions but every other daily operational decision of the venture—the likely result would be the end of the joint venture as a useful method of business organization.[10]

This Court in *Copperweld* recognized that one of the "eminently sound reasons" for limiting Section 1 to concerted action is to avoid "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness." 467 U.S. at 775. It is hard to imagine a more perfect example of that concern come to life than the Ninth Circuit's decision, which invites after-the-fact antitrust review of the myriad purchasing and selling decisions inherent in a legitimate joint venture's operation of its own business. To avoid enmeshing the courts in a function for which they are ill-suited, and to

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[10] The Ninth Circuit similarly dismissed Equilon's concern that selling its brands at different prices might be found to violate the Robinson-Patman Act. The court asserted that the Act is "unquestionably . . . inapplicable" because the brands have different additive packages and were marketed differently. Pet. App. 25a. Perhaps the Ninth Circuit majority did not have the advantage of a complete understanding of the complicated history of Robinson-Patman Act jurisprudence. If it had, it would have understood that, at the time Equilon made its pricing decision, it did not have the luxury of the Ninth Circuit's certainty. *See FTC v. Borden Co.*, 383 U.S. 637 (1966) (holding that products are not differentiated for Robinson-Patman Act purposes by separate brand identities); *In re Standard Oil Co.*, 49 F.T.C. 923, 952 (1953) ("chemical analysis" is not the "important competitive factor" in retail gasoline distribution).

avoid the accompanying risk of defeating the very procompetitive benefits for which companies legitimately create joint ventures, a bona fide joint venture's operation of its own separate business should be treated as single firm conduct. As Professors Areeda and Hovenkamp have recognized, once a joint venture is itself permitted, its "function will be performed most efficiently by an organization that can operate with the same legal freedoms as the ordinary business entity." VII *Antitrust Law* ¶ 1478c, at 326.

For similar reasons, the Ninth Circuit's ruling also raises serious remedial issues. One of the reasons for subjecting concerted action to closer scrutiny is that "*concerted* action . . . is amenable to a remedy that does not require judicial estimation of free-market forces." *Trinko*, 540 U.S. at 410 n.3 (emphasis in original). "Conspiracies among unrelated entities are relatively infrequent, easily appraised for reasonableness and simply remedied through prohibition." VII *Antitrust Law* ¶ 1402, at 8. None of these characteristics describe an integrated venture's operation of its own business. Nor is it possible to imagine a simple remedy for any conduct a court might deem inappropriate. To deny a production and marketing venture the power to price and sell its own product is effectively to deny its ability to exist. Indeed, the effect would be to frustrate the very formation of the venture—a venture that in this case both courts below recognized is a bona fide efficiency-enhancing endeavor. Pet. App. 4a (noting the "voluminous record documenting the economic justifications" for the venture), 50a ("the undisputed evidence shows potential and realized efficiencies occurring within functioning and integrated enterprises"). As Judge Fernandez colorfully described it below, the Ninth Circuit majority's ruling creates an "exotic beast, no less strange than a manticore, roaming the business world. This beast would otherwise be a true business, but when it acts like a true business—sets prices for its own goods—it subjects its otherwise insulated members to the severe sting of antitrust liability." *Id.* at 32a.

Recognizing Equilon as a single entity is fully consistent with this Court's cases analyzing certain joint venture conduct under Section 1. In each of those cases, unlike the present case, the venture's owners remained competitors in the relevant market and the restraint at issue related to the subject of that continuing competition. Thus, in *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ("*BMI*"), the composers and other copyright owners who joined together to offer a blanket license for their copyrighted works did not fully integrate and end competition between them. The venture members each continued to produce and own their own copyrighted works and "retain[ed] the rights individually to license" those works. *Id.* at 11. The Court thus concluded that the defendant organizations "plainly involve[d] concerted action in a large and active line of commerce." *Id.* at 10. Similarly, in *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984), the members of the NCAA remained competitors in the market for college football games and the challenged restraint restricted that competition by "limit[ing] members' freedom to negotiate and enter into their own television contracts." *Id.* at 98. The Court thus concluded that the "NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with each other." *Id.* at 99. Equilon's pricing decisions do not constitute any such agreement among competitors about how they will compete. Equilon's owners do not compete against each other in any relevant market. The pricing decisions relate solely to Equilon's validly created, separate business.[11]

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[11] This Court's other joint venture cases similarly involved restraints that related to continuing non-venture competition among the members. *See also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986) (applying Section 1 to dental association rule prohibiting individual members from submitting x-rays to insurers); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (applying

As this Court's cases demonstrate, treating an integrated joint venture as a single entity when it operates its own business does not mean that, once formed, a joint venture is immune from the antitrust laws. Where venture owners agree to restraints on their non-venture conduct, such collateral restraints remain subject to antitrust scrutiny. Thus, for example, if Shell and Texaco had agreed when forming Equilon or thereafter upon the pricing or output of products outside of the venture as to which those two companies continued to compete, that agreement would be subject to Section 1. *See* XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2122b, at 132 (2d ed. 2005) (recognizing that a joint venture might threaten competition if it "eliminate[s] the competition that exists between the joint venture participants outside the venture. This might happen if the joint venture becomes an excuse for price fixing with respect to the venturers' nonventure business . . . ."). No such claim is asserted here. Similarly, the venture's operation of its own business is subject to antitrust scrutiny on the same basis as any other single company would be, including scrutiny under Section 1 for any concerted action with other entities and under Section 2 for monopolization or attempted monopolization.

The decision below should be reversed not just because it is clearly wrong, but because the proper resolution of these issues has broad practical ramifications. Joint ventures are present in nearly every sector of business and are an increasingly important source of economic growth. *See* Jon G. Shepherd, Editor's Note, *Symposium: Antitrust Scrutiny*

Section 1 to decision of members of a purchasing cooperative to expel a competing retailer); *Maricopa County*, 457 U.S. at 356 ("Each of the foundations is composed of individual practitioners who compete with one another for patients."); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (applying Section 1 to professional association's restriction on competitive bidding by its members).

of Joint Ventures, 66 Antitrust L.J. 641, 641 (1998); Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1139 (2001). As observed by leading antitrust commentators, "the legal and economic literature on joint ventures is largely favorable toward them, and antitrust generally begins its analysis with a presumption of legality." XIII *Antitrust Law* ¶ 2121b, at 117-18. The *Collaboration Guidelines* similarly recognize that competitor collaborations "often are not only benign but procompetitive." *Guidelines*, Preamble. They can produce real consumer benefits because "[c]ooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production." *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 188 (7th Cir. 1985). It is therefore critical that judicial and regulatory enforcement not foster "a perception that antitrust laws are skeptical about" such collaboration and thereby deter its development. *Guidelines*, Preamble.[12]

Unless the Ninth Circuit's misguided decision is overruled, and this Court clearly states that legitimate joint ventures cannot be subject to this kind of meritless attack, we

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[12] To the extent the Ninth Circuit's decision does not deter the formation of joint ventures altogether, it may have the perverse effect of encouraging companies seeking to create efficiencies to eliminate competition to an even greater degree by fully merging all of their operations. The antitrust laws should not be applied in a manner that produces such a skewed result. *Cf.* Carl Shapiro & Robert D. Willig, *On the Antitrust Treatment of Production Joint Ventures*, 4 J. Econ. Perspectives 113, 119 (1990) ("If the *per se* rule were applied to joint ventures, a paradoxical result would emerge: ventures would be treated more harshly than mergers, although mergers clearly have greater potential for diminishing competition."); *Trinko*, 540 U.S. at 414 (cautioning that courts should avoid mistaken application of the antitrust laws that "chill[s] the very conduct the antitrust laws are designed to protect") (internal quotation marks omitted).

will undoubtedly see more needless litigation and, quite likely, a severe reduction or elimination of the use of the joint venture mechanism as a tool to solve business problems. As one commentator observed, in language that presaged the present case, "[t]reating joint ventures as single entities for limited purposes allows meritless group-boycott and price-fixing claims, which could be erroneously decided under the *per se* rule, to be rejected as a matter of law." Werden, *supra*, at 705 n.18. This Court should make clear that this is the proper legal standard.

C. The Ninth Circuit's Reasons For Treating Equilon's Daily Operation As An Ongoing Conspiracy Are Groundless.

The Ninth Circuit sought to justify its contrary result on the ground that there is a "triable issue of fact" as to whether Shell and Texaco had agreed upon the pricing strategy "in advance" when negotiating Equilon's formation, as opposed to after Equilon formally came into existence. Pet. App. 19a n.11. But even if this factual point were legitimately disputed, it is completely irrelevant. The decision at issue here was how to price the venture's products after the venture began operation. Whether that decision was made by the venturers at the time they negotiated the creation of the venture, or by the venturers after the venture was formed, or by the business managers of the venture who had been delegated that responsibility by the venture's owners, makes no difference to the legal analysis because it has no competitive consequence.

It is common that, in negotiating the formation of a venture, the parties involved will discuss, and frequently agree on, how the venture will operate if and when formed. Indeed, it is commonly necessary to make assumptions about the venture's operations in order to evaluate the business desirability of even entering the venture. In any merger transaction—and this was effectively a merger—the merging parties routinely establish integration teams that make

tentative determinations about how the new, merged entity will operate once the transaction is completed. The notion that these decisions, so long as implemented only after the new entity is in fact formed, could be *per se* legal if the new entity is the result of a formal merger, but potentially *per se* illegal if the new entity is a joint venture, is unsupportable by either antitrust principles or common sense.

For similar reasons, it is irrelevant that Equilon was overseen by a Members Committee comprised of representatives from Shell and Texaco. This was the functional equivalent of a board of directors of a corporation. The owners of any business must oversee the business in some manner, whether directly or by delegation to the business' employees. In modern public corporations, shareholders elect directors, who then appoint and oversee business managers. Here, the two owners of Equilon appointed a Members Committee, which appointed and oversaw business managers. JA 124-25 (¶¶ 52, 55-56). These are competitively identical structures. The fact that there were only two owners of Equilon, as opposed to thousands or millions of shareholders, has no antitrust significance. Where (as in this case) the owners of the venture no longer compete in the relevant market and their oversight or control of the joint venture pertains solely to the venture's operation in that market, the fact that the owners may compete elsewhere in other markets cannot turn an otherwise legitimate business decision into a *per se* violation of Section 1, because such decisions do not involve any "sudden joining of two independent sources of economic power" within the meaning of Section 1. *Copperweld*, 467 U.S. at 771. In the absence of any remaining competition between Shell and Texaco in the relevant market, it is of no consequence to any antitrust policy whether or how they were involved in pricing the product of the company they jointly own.

The Ninth Circuit inexplicably suggested that its "analysis would be different" if Equilon were producing a "new product" or if Shell and Texaco had "merge[d] their current

product lines into one collective brand." Pet. App. 27a. The Ninth Circuit did not explain why Section 1 scrutiny should turn on such distinctions. If any competitive significance attends the fact that a joint venture entity is producing something one or more of its members had previously produced rather than a new product, such significance will be accounted for in evaluating the venture's formation and structure. Once the venture itself is found valid, whether it is producing a new product or an old one is irrelevant to any policy underlying Section 1.[13]

Nor is it conceivably relevant that the combined entity sells its product under two or more brand names rather than one. Application of Section 1 to a producer of consumer products surely cannot turn on whether it sells those products under one brand or several different brands (a practice that is

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[13] A joint venture need not produce a new product to be procompetitive or valid under the antitrust laws. As in this case, joint ventures also enable companies to achieve crucial and procompetitive efficiencies by (among other things) eliminating redundancies, obtaining economies of scale, and facilitating access to complementary resources. *E.g.*, *Northwest Wholesale Stationers*, 472 U.S. at 295 (joint purchasing venture "permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice"); *Copperweld*, 467 U.S. at 768 ("[M]ergers, joint ventures and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively."); *NCAA*, 468 U.S. at 103 ("a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive"); Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust L.J. 937, 938 (1993) ("Most joint ventures are created to enable the participants to achieve efficiencies. Joint ventures can enable participants to attain economies of scale or scope, allow participants to share risks that no individual member may be able to undertake alone, facilitate the integration of complementary skills, knowledge, or assets in a new process or product, or facilitate the production of a new product that could not otherwise be produced.").

quite common in many markets), regardless of whether it sets the same price for each or how it reaches its pricing decisions. No different rule should apply to a fully integrated joint venture that chooses to sell its products under multiple brand names rather than one. The Ninth Circuit's contrary conclusion only demonstrates the fallacy of its approach. As one commentator recently observed, under the Ninth Circuit's approach, "discontinuing one brand in favor of the other is perfectly lawful, but continuing to sell both brands at the same price is *per se* unlawful. The court's approach elevates form over substance and loses sight of the goals of antitrust . . . ." Smith, *supra*, at 57.[14]

II. THE NINTH CIRCUIT'S RULING THAT *PER SE* TREATMENT MAY BE APPLIED CONFLICTS WITH THIS COURT'S DECISIONS AND BASIC ANTITRUST PRINCIPLES.

The fact that Section 1 does not apply to the conduct here requires reversal of the Ninth Circuit's ruling and entry of judgment for defendants. But even if a joint venture's operation of its business could be viewed as concerted action that may be evaluated separately from the venture's forma

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[14] The Ninth Circuit also suggested that Section 1 scrutiny is necessary to prevent companies from using joint ventures as "fronts for price-fixing." Pet. App. 26a. But in such a case—demonstrably not this case—the venture or its parents would not be entitled to single firm treatment, which should be reserved for decisions of a validly formed entity acting in its own right to conduct its own separate business. If no such business has been validly formed, or if the restraint at issue concerns something other than the entity conducting its own business, Section 1 may apply. For this reason, the Ninth Circuit's hypothetical of Pepsi and Coca-Cola forming a research joint venture and then using that as a front for fixing the price of soft drinks, Pet. App. 16a, is a straw man. Any such price-fixing would clearly not be part of the research joint venture's business but would merely be a restraint on the members' activities outside the venture and would be fully subject to Section 1 scrutiny.

tion, there is no place in that evaluation for the *per se* rule. This Court's precedents and settled antitrust doctrine require that, if Section 1 applies at all, Equilon's pricing decisions must be reviewed under the rule of reason.

A. This Court's Precedents Reject *Per Se* Treatment For Restraints Of This Type.

The "rule of reason [is] the prevailing standard of analysis" under Section 1. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *see Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard"). "[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Continental T.V.*, 433 U.S. at 58-59. This is because the *per se* rule functions as a "conclusive presumption" that forecloses any inquiry into whether the restraint actually has any anticompetitive effect or produces any procompetitive benefits. *Maricopa County*, 457 U.S. at 345. Because of its draconian nature, *per se* treatment is reserved for cases in which it can be said confidently that the conduct at issue is "plainly anticompetitive" and likely to have no "redeeming virtue." *BMI*, 441 U.S. at 8. The restraint at issue must be such that its "nature and necessary effect [is] so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692; *Indiana Fed'n of Dentists*, 476 U.S. at 458-59 (noting the Court's reluctance to "extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"). *See also State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) and rejecting application of *per se* rule to vertical maximum price-fixing).

Applying this standard, this Court and the lower courts have repeatedly rejected *per se* treatment for conduct that is

part of the operation of a valid joint venture—including activity that outside of that context would have been subject to *per se* condemnation. In *BMI*, the Court held that the rule of reason governed the decision of copyright owners to create an association to offer a blanket license covering their copyrighted music. Even though the association's activity included setting the price for the license, the Court held that *per se* condemnation was not proper because the license "accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use" achieved by the venture and "a necessary consequence of an aggregate license is that its price must be established." 441 U.S. at 20-21. In explaining the impropriety of *per se* treatment in these circumstances, the Court noted that the question cannot be resolved by labeling the conduct "price fixing." Such "[l]iteralness is overly simplistic and often overbroad." *Id.* at 9. As the Court observed, "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* This is because

> [n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

Id. at 23.

Similarly, in *NCAA*, the Court found *per se* treatment improper for the NCAA's restriction on the number of football games individual teams could televise, even though such an output restriction would "ordinarily [be] condemned as a matter of law under an 'illegal *per se*' approach.'" 468

U.S. at 100. *Per se* treatment was improper because the NCAA's operation as a sponsor of sporting events required a "certain degree of cooperation" among the member schools. *Id.* at 117. The Court likewise rejected *per se* treatment in *Northwest Wholesale Stationers*, after noting that the wholesale purchasing cooperative there "permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies." 472 U.S. at 295. The Court relied on the fact that such cooperatives "must establish and enforce reasonable rules in order to function effectively" and that the disclosure rule at issue there "may well provide the cooperative with a needed means of monitoring the creditworthiness of its members." *Id.* at 296.

Following these precedents, the lower courts have similarly rejected *per se* treatment for price-setting decisions made by joint ventures or their members. *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002) (rejecting argument that restrictions on player salaries imposed by Major League Soccer should be treated as a *per se* illegal price-fixing conspiracy among the team operators; "rejection of the *per se* rule is straightforward" because "the extent of real economic integration is obvious"); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) (rejecting *per se* treatment for a distribution joint venture's setting of fees paid to retailers; *per se* treatment is limited to the circumstance where the agreement on price is "not part of a larger, legitimate economic venture"); *Nat'l Bancard Corp. v. Visa U.S.A.*, 779 F.2d 592, 602 (11th Cir. 1986) (rejecting *per se* treatment for an agreement among members of the Visa joint venture to charge an interchange fee; "[f]or a payment system like VISA to function, rules must govern the interchange of cardholder's receivables" and the interchange fee "represents one such rule").

Based on these precedents, it should have been obvious that *per se* treatment is improper here. Indeed, this case presents an even stronger circumstance for rejecting the *per se* rule than the foregoing cases. In each of those cases, the

participants in the venture continued as competitors in the relevant market, raising the possibility that operation of the venture could reduce the competition otherwise existing between them. No such possibility exists here. As the Ninth Circuit itself recognized, Equilon's creation "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." Pet. App. 5a. Thus, there is no issue here of a price-fixing agreement between companies regarding a product as to which they are in competition. *See BMI*, 441 U.S. at 8 (*per se* rule applies to "agreements among competitors to fix prices on their individual goods and services").

In permitting Equilon to be formed as a production *and* marketing venture, the FTC and the state regulators concluded that (with certain divestitures) Equilon would lack the market power necessary to adversely affect competition in its markets. While that conclusion does not bind this Court as to the ultimate lawfulness of Equilon's activity, it is entitled to significant weight.[15] And it should be given particular (if not dispositive) weight in resolving whether Equilon's exercise of its pricing function may be deemed so patently anticompetitive that the Court can "predict with confidence that the rule of reason will condemn it." *Maricopa County*, 457 U.S. at 344. It is difficult to conceive how the Ninth Circuit majority could make such a prediction, without the benefit of any market analysis, when the expert government regulators, after careful and extensive

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[15] *See BMI*, 441 U.S. at 13 (entry of consent decree is "a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice.") (footnote omitted).

market analysis, had concluded that the entry of a consent decree had "alleviate[d] the alleged competitive concerns arising from the Joint Venture," including concerns that Equilon would have the ability to adversely affect market prices. FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. at 67,869. At the very least, a regulator's prior conclusion that competition will not be harmed by the formation of a marketing joint venture (which inevitably must set the price for its products) should require that a court evaluate all the relevant facts and circumstances before holding unlawful the exercise of the very power the regulators found the venture could permissibly hold.

The impropriety of *per se* treatment here is confirmed by the stark contrast between this case and the cases in which this Court has found *per se* treatment proper for alleged joint venture or associational activity. In each of those cases, the agreement at issue pertained to a subject as to which the defendants remained in competition and therefore as to which the agreement had the effect of restraining competition that had not already validly been eliminated. The Ninth Circuit relied heavily on *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135 (1969), which applied the *per se* rule to a newspaper joint venture. That venture, however, was not setting prices for the venture's own product as to which the newspapers had validly ended all competition. Instead, the newspapers had agreed on rates for their separately owned and produced news and editorial content. Similarly, in *Maricopa County*, the Court's express basis for applying the *per se* rule was that (unlike this case) the doctors had *not* "pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit" but had agreed as "independent competing entrepreneurs" on the "price at which each will offer *his own services*." 457 U.S. at 356-57 (emphasis added). And in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951), the purported "joint venture" did not involve any efficiency-enhancing integration at all.

Because there remained no competition to restrain, Equilon's pricing decisions obviously cannot be "plainly anticompetitive." *State Oil*, 522 U.S. at 10 (*per se* rule is limited to restraints that have "predictable and pernicious anticompetitive effect"). Indeed, it is impossible to imagine how they could have been anticompetitive at all.[16]

B. The Ninth Circuit's "Necessity" Standard Is Unfounded.

The Ninth Circuit asserted that applying the *per se* rule was appropriate unless Equilon could prove that its pricing decisions were "'necessary' to the legitimate aims of the joint venture." Pet. App. 21a. And it was not enough that it was "necessary" to set some price for its gasoline. According to the Ninth Circuit, to avoid *per se* condemnation, Equilon was required to additionally prove that it was necessary for it to set "one, unified price for both the Texaco and Shell brand of gasoline instead of setting each brand's price independently on the basis of normal market factors." *Id.*

The Ninth Circuit's reasoning was groundless. No antitrust principle supports the notion that a legitimate joint venture must establish the "necessity" of its individual operational decisions to avoid *per se* condemnation—let alone that it must establish the necessity of the particular prices it selects. Any such requirement would wreak havoc on the business of such ventures. The manner in which a

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[16] This same analysis compels rejection of respondents' alternative assertion of liability under a "quick look" theory (a theory that the district court rejected, Pet. App. 68a, and the Ninth Circuit declined to reach, *id.* at 13a n.7). Quick look liability requires that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). That standard is not met here, where the challenged restraint pertained to a product as to which competition already had been validly ended.

firm carries out its daily business is a matter of business judgment, and a decision to sell at a particular price—or in a given quantity, or to a particular customer—is generally no more "necessary" to the venture's efficient operation than selling at some other, slightly different price or quantity or to some different customer. To rest potential *per se* condemnation on *post hoc* speculation about the merits of individual business decisions would allow a whole range of routine business decisions that are not in any way anticompetitive to be placed in the same analytical box as horizontal price fixing or bid rigging. This is nonsensical, and precisely the kind of "formalistic line drawing" divorced from any "demonstrable economic effect" that this Court has previously rejected as a permissible basis for applying the *per se* rule. *Continental T.V.*, 433 U.S. at 58-59.

Rather than investigating whether every operational aspect of a legitimate joint venture can be separately justified as "necessary," the proper approach under this Court's precedents to determining whether the *per se* rule applies is to ask whether the conduct at issue "always or almost always tend[s] to restrict competition and decrease output." *BMI*, 441 U.S. at 19-20. Here, to ask the question is to answer it: no competition existed in the relevant market between Shell and Texaco that could be restricted and thus no basis exists for *per se* treatment.

The Ninth Circuit's reliance on *BMI* and *NCAA* for its "necessity" ruling, Pet. App. 21a, turned those decisions on their head. In *BMI*, this Court did not ask whether the defendants' particular pricing strategy was "necessary" to achieve the venture's procompetitive purposes. Rather, it was enough that the defendants could not market the license without setting some price for it. In other words, an inherent part, or "necessary consequence," of the venture itself was that a price be established for the license. 441 U.S. at 21. The legality of the price-setting thus had to be evaluated in the context of the overall efficiency-enhancing venture of which it was part—not carved out for separate condemnation

unless the venture could prove that the particular pricing mechanism or the particular price selected was "necessary" as compared to some other possibility. This was true even though, unlike this case, the individual copyright owners had not fully integrated their operations and remained competitors with each other.

Similarly, in *NCAA* this Court did not evaluate the "necessity" of the NCAA's rule restricting the number of football games individual schools could televise. In rejecting *per se* treatment for what was clearly an output limitation (normally subject to *per se* treatment if agreed to by multiple firms), the Court did not require proof that the particular number of games set by the NCAA was necessary to the NCAA's purposes. Indeed, the Court did not require proof that any output restriction at all was necessary—and the Court's ultimate conclusion, after a rule of reason analysis, was that no output restriction was justified. The Court's application of the rule of reason to the NCAA's clear output limitation hardly supports applying the *per se* rule to an operational decision that by definition can have no competitive effect.

The Ninth Circuit also suggested that its "necessity" standard was proper under the ancillary restraints doctrine. Pet. App. 21a, 27a. This was wrong for two reasons. First, the ancillary restraints doctrine is not applicable here; the pricing decision that is challenged is an integral part of the venture, not something collateral to it. The ancillary restraints doctrine is generally traced to *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). In describing the doctrine, the court there referred to restraints that limited competition among the venture members *outside of the venture*, principally covenants not to compete. *Id.* at 281; *see also Business Elecs.*, 485 U.S. at 729 n.3 ("The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market."). Later cases have similarly recognized that the doctrine applies to a

restraint that "is subordinate and collateral to a separate, legitimate transaction." *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 224 (D.C. Cir. 1986).

Here it makes no sense to ask whether the restraint was properly "subordinate" or "collateral" to a "separate" transaction. Pricing Equilon's output was inherently part and parcel of the venture itself as a production and marketing venture. By requiring that collateral restraints be reasonably necessary to the venture's success, courts ensure that venture participants do not use the venture as an excuse to restrain their otherwise independent conduct in ways unrelated to the venture. *See* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1908b, at 229 (2d ed. 2005) (doctrine protects against cartels being shielded "from the heightened scrutiny attending naked restraints by the simple device of attaching the cartel agreement to some other, independently lawful transaction"). Here, there was no otherwise independent conduct to restrain, because the venture had already eliminated all competition between Shell and Texaco in the relevant market.

Second, even if the ancillary restraints doctrine were relevant here, it is satisfied. Where that doctrine applies, the question it asks is whether the collateral restraint "promoted enterprise and productivity at the time it was adopted. *If it arguably did*, then the court must apply the Rule of Reason to make a more discriminating assessment." *Polk Bros.*, 776 F.2d at 189 (emphasis added); *see also Rothery*, 792 F.2d at 229 (an ancillary restraint is "one that is part of an integration of the economic activities of the parties and *appears capable* of enhancing the group's efficiency") (emphasis added). This standard is unquestionably met here. Equilon's pricing of its product did not simply contribute to Equilon's efficient operation; Equilon could not have operated at all as an integrated production and marketing

venture without setting some price for its product. There is thus no basis for condemning it as *per se* unlawful—or, indeed, for finding it unlawful at all.[17]

Contrary to the Ninth Circuit's ruling, there is no further requirement that the particular prices Equilon set be "necessary." No court applying the ancillary restraints doctrine (or any other standard under Section 1) has required a showing that the particular price selected by the venture be "necessary," whatever that might mean. The reason is obvious: Equilon (like any other entity producing and selling products) had to charge some price for its products. How is a court (or a lay jury) to determine whether one pricing strategy is any more or less "necessary" than some other strategy? How is a defendant to make such a showing? If in "setting each brand's price independently on the basis of normal market factors," Pet. App. 21a, Equilon had adopted a one cent differential between the brands, would that have avoided *per se* condemnation? What if the differential were three cents or if it varied by geographic area? And what relation does any of this have to determining whether the prices set by Equilon had any effect on competition? *Cf. Rothery*, 792 F.2d at 227 (rejecting contention that ancillary restraints doctrine requires that courts "calibrate degrees of reasonable necessity").

In rejecting *per se* treatment in *BMI*, this Court relied on the fact that the reach of such a rule would "be quite difficult to contain." 441 U.S. at 16. The court of appeals there had

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[17] As Professor Hovenkamp has stated, where a joint venture makes one or more products, those products "are jointly owned and cannot be sold without an agreement between the owners as to the price that will be charged for them." XI *Antitrust Law* ¶ 1908e, at 264. Accordingly, so long as the joint venturers do "not enter into any agreement to fix the price of their nonventure output," no charge of *per se* unlawful price fixing is legitimate. *Id.*; *see also id.* ¶ 1906d, at 239 ("[M]any forms of joint marketing require an agreement about the price to be charged.").

ruled that it was *per se* illegal for the defendants to issue a blanket license for a single fee. As this Court noted, however, under that theory, there is no reason why it would not be equally illegal for the defendants to set different fees for different purchasers. *Id.* at 16-17. Either way, the venture would be "fixing" the selling price for the joint product. Assuming that Section 1 has any application at all here, the Ninth Circuit's rule suffers from the same defect and must be rejected for the same reason.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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Nos. 04-805 and 04-814

Supreme Court, U.S.
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In The Supreme Court of the United States

TEXACO INC.,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does an agreement by two competing oil companies to fix prices through a joint venture, unrelated to any purpose of the joint venture, violate Section 1 of the Sherman Act under the *per se* rule or quick look rule of reason?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
1. Overview	2
2. Formation of "The Alliance"	4
3. Shell and Texaco Control of The Alliance	7
4. Fixing the Price of the Shell and Texaco Brands	7
5. The Court of Appeals' Decision	13
SUMMARY OF ARGUMENT	15
ARGUMENT	17
I. This Is an Appeal From Summary Judgment, in Which Respondents Are Entitled to Have the Evidence Viewed in the Light Most Favorable to Them	17
II. The Illegality of Petitioners' Price Fixing Is Plain Beyond Peradventure	18
III. *Copperweld* Should Not Be Extended to Joint Ventures	22
A. No protected status for joint ventures	23
B. Absence of evidentiary support	24
C. Absence of legal authority to extend *Copperweld*	27
D. Against sound public policy	29

TABLE OF CONTENTS – Continued

Page

IV. It Is Incorrect to Argue That Fixing the Price of the Shell and Texaco Brands Could Not Have Restrained Competition, Because Competition Between Shell and Texaco Had Already Ended 31

A. Errors of fact 32

B. Errors of law 33

V. The Court of Appeals Properly Followed and Applied the Precedents of This and Other Courts in Analyzing the Pricing Restraint Imposed by Shell and Texaco on The Alliance, and in Treating the Restraint as a *Per Se* Violation of Section 1 38

A. Analysis of pricing restraints by joint ventures 38

B. Application of the *per se* or "quick look" rule 41

VI. The Decision of the Court of Appeals, if Affirmed, Will in No Way Impede the Lawful Activities of Joint Ventures 49

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Advanced Health-Care Servs., Inc. v. Radford Community Hosp., 910 F.2d 139 (4th Cir. 1990) 27

American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982) 30

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 17

Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) 15, 16, 23, 24, 28, 29, 33, 34, 41

Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001) 38

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) 15, 16, 23, 28, 34, 35, 36, 42, 48

California v. American Stores Co., 697 F. Supp. 1125 (C.D. Cal. 1988), *aff'd in part and rev'd in part on other grounds*, 872 F.2d 837 (9th Cir. 1989), *rev'd*, 495 U.S. 271 (1990) 46

California Dental Ass'n v. FTC, 526 U.S. 756 (1999) 16, 23, 28, 35, 44, 45

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) 33

Centennial School Dist. v. Independence Blue Cross, 1994 WL 62016 (unpublished) (E.D. Pa. 1994) 27

Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969) 1, 15, 16, 18, 19, 20, 23, 29, 31, 33, 34, 41, 42, 47

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 22

City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc., 838 F.2d 268 (8th Cir. 1988) 27

TABLE OF AUTHORITIES – Continued

Page

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 10, 17, 26

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) ... 14, 15, 22, 23, 24, 27, 28, 29, 30, 31, 37

Dagher v. Saudi Refining, Inc., 369 F.3d 1108 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2957 (2005), 125 S. Ct. 2958 (2005) ..... *passim*

Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992) 17, 23, 35

Fraser v. Major League Soccer, LLC, 284 F.3d 47 (1st Cir. 2002) 38

Freeman v. San Diego Bd. of Realtors, 322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003) 27, 38, 40, 48

FTC v. Butterworth Health Corp., 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) 46

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.D.C. 2001) 46

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 15, 16, 20, 23, 24, 29, 35, 37, 43

FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) 46

FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) 46

FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) 33

FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000) 46

FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991) 46

TABLE OF AUTHORITIES – Continued

Page

General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984) 38, 39, 48

Healthamerica Pennsylvania, Inc. v. Susquehanna Health Sys., 278 F. Supp. 2d 423 (M.D. Pa. 2003) 27

Law v. NCAA, 134 F.3d 1010 (10th Cir.), *cert. denied*, 525 U.S. 822 (1998) 38, 39

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 17

McNeil v. National Football League, 790 F. Supp. 871 (D. Minn. 1992) 27

Metropolitan Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d 563 (S.D.N.Y. 2004) 27

National Bancard Corp. v. Visa U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986) 38

National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978) 35, 43, 48

NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984) 15, 16, 20, 23, 28, 29, 35, 36, 42, 43, 44

Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) 33

Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185 (7th Cir. 1985) 38

In re Polygram Holding, Inc., Docket No. 9298 (FTC), available at http://www.ftc.gov/os/2003/07/polygramopinion.pdf, pp. 10, 54-58, *aff'd*, 416 F.3d 29 (D.C. Cir. 2005) 40

Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005) 31, 45

TABLE OF AUTHORITIES – Continued

Page

Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc., 814 F.2d 358 (7th Cir. 1987) 38, 39

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 30, 46

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 27, 38

Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51 (2002) 22

Sullivan v. National Football League, 34 F.3d 1091 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995) 27

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 15, 16, 23, 24, 28, 29, 33, 41

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899) 16, 17, 38

United States v. Long Island Jewish Med. Cntr., 983 F. Supp. 121 (E.D.N.Y. 1997) 46

United States v. Sealy, Inc., 388 U.S. 350 (1967) 15, 16, 23, 41

United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940) 24, 33, 34, 45

United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) 15, 16, 23, 33, 41, 48

United States v. United Tote, Inc., 768 F. Supp. 1064 (D. Del. 1991) 46

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 30

TABLE OF AUTHORITIES – Continued

Page

RULES AND STATUTES

15 U.S.C. § 1 ..... *passim*

15 U.S.C. §§ 1801-04 20

OTHER AUTHORITIES

Antitrust Guidelines for Collaborations Among Competitors, Issued by the Federal Trade Commission and the U.S. Department of Justice, April 2000 30

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Herbert Hovenkamp, *XIII Antitrust Law*, ¶ 2101 (2d ed. 2005) 29

Herbert Hovenkamp, *XIII Antitrust Law*, ¶ 2103 (2d ed. 2005) 48

STATEMENT OF THE CASE

Petitioners Shell Oil Company ("Shell") and Texaco Inc. ("Texaco") formed two joint ventures to refine and sell their brands of gasoline in 1998. The ventures introduced no new products. Agreeing that their brands of gasoline were to be treated equally, Shell and Texaco retained control over how the ventures marketed the brands.

Eight months after forming the ventures, Shell and Texaco agreed with each other to take pricing discretion away from the ventures and directed them to charge the same dealer tankwagon prices for the Shell and Texaco brands of gasoline. Although Shell and Texaco had justified the ventures by alleged cost savings (none of which were passed on to consumers), charging the same prices for the brands resulted in no cost savings or efficiencies, and was not reasonably necessary to achieve any legitimate purpose of the ventures. It also was immediately followed by large price increases in markets where the ventures had dominant shares.

The United States Court of Appeals for the Ninth Circuit quite properly held that a jury could find this conduct to be *per se* unlawful price fixing in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.[1]

Now Shell, Texaco, and their various *Amici* ask this Court to ignore its decision in *Citizen Publ'g Co. v. United States*, 341 U.S. 593 (1969), and abandon over a century of antitrust jurisprudence by holding that simply because Shell and Texaco formed joint ventures, they could engage

[1] The court of appeals did not consider Respondents' alternative claim that the price fixing violated Section 1 under the "quick look" rule of reason.

in price fixing not integral to their ventures.[2] This has never been the law of this Court, and should not become so now.

1. Overview.

On January 1, 1998, Shell and Texaco combined marketing and refining assets in the western United States in a joint venture, Equilon Enterprises LLC ("Equilon"). Joint Appendix ("JA") 73 (¶ 6). On July 1, 1998, they did the same in the eastern United States through a second joint venture, Motiva Enterprises LLC ("Motiva"). JA 73 (¶ 7).[3] Equilon and Motiva marketed the Shell and Texaco brands of gasoline through licenses and Brand Management Protocols, which reserved overall control of brand marketing to Shell and Texaco and prohibited Equilon and Motiva from favoring either brand over the other. JA 77-78 (¶¶ 52-56).

Until September, 1998, Equilon and Motiva set separate and distinct dealer tankwagon prices for the Shell and Texaco brands of gasoline through their own

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[2] Shell and Texaco repeatedly refer to their ventures as "lawful." Respondents, however, have never conceded the lawfulness of the joint ventures, nor has this issue ever been litigated. To the contrary, the complaint alleges that each joint venture was formed by Shell and Texaco with the purpose of fixing "prices between themselves on gasoline sold to the independent Shell and Texaco branded dealers." Joint Appendix ("JA") 23, 24 (¶¶ 80, 84). The complaint further alleges that the joint ventures were unlawful combinations to fix prices in violation of Section 1 of the Sherman Act. JA 28 (¶ 108).

[3] A third owner was Saudi Refining, Inc. ("SRI"), with which Texaco operated another joint venture, Star Enterprise, which became part of Motiva. JA 72 (¶ 4). SRI, originally a defendant, obtained summary judgment on the issue of Respondents' standing, a ruling not before this Court.

pricing departments, as Shell and Texaco had done before the ventures. JA 78 (¶¶ 55-56); Deposition of Richard Broderick, pp. 24-44.[4] At that time, Shell and Texaco agreed to require Equilon and Motiva to set the same price for the Shell and Texaco brands. 3 Record at 509-85.[5] Under the new pricing policy, dealer tankwagon gasoline prices immediately rose precipitously while the price of crude oil was falling to its lowest level since the Depression. 3 Record at 490, 586-87; 4 Record at 735-38.[6]

On June 15, 1999, Respondents, independent Shell and Texaco dealers in California, sued Shell and Texaco in the United States District Court for the Central District of California. JA 1; 1 Record at 2.[7] Respondents claimed that the agreement to fix the same price for the brands violated Section 1 under either the *per se* rule or the quick look rule of reason. After discovery and denial of a motion to dismiss

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[4] The entire deposition of Mr. Broderick is attached as Exhibit J to the Supplemental Declaration of Andrew C. Finch in Support of Defendants' Motion for Summary Judgment filed under seal in the district court on October 5, 2001 (Lower Court Docket Nos. 148-150). The certified record on appeal was filed with the court of appeals on August 22, 2003.

[5] References to ___ Record at ___ are references to Appellant's Excerpts of Record filed in the Ninth Circuit Court of Appeals on December 13, 2002. The initial number is the volume number, and the final numbers are specific page numbers in the Excerpts of Record.

[6] Exhibits 336 and 337, CDs containing dealer tankwagon and crude oil pricing data are attached at Tabs 36 and 38 of the Declaration of Daniel R. Shulman in Support of Plaintiffs' Motion for Partial Summary Judgment, Volumes 3 and 4, filed under seal in the district court on July 27, 2001 (Lower Court Docket Nos. 128-131). The certified record on appeal was filed with the court of appeals on August 22, 2003.

[7] Respondents brought suit on behalf of themselves and a class of all Shell and Texaco dealers in the United States. The issue of class certification has not been litigated and remains to be decided in the district court after this matter is remanded.

for failure to state a claim (1 Record at 1-21), the court granted summary judgment in favor of Shell and Texaco (Pet. App. at 34a-69a).[8] On appeal, the Ninth Circuit reversed, Pet. App. at 2a-33a, holding that a jury could find the conduct of Shell and Texaco to be *per se* unlawful price fixing. "Indeed," the court said, "the record is close to establishing that the price-fixing scheme was sufficiently unrelated to accomplishing the legitimate objectives of the joint venture as to justify granting the plaintiffs' [Respondents' cross-] motion for summary judgment." Pet. App. at 23a at n.16. The case was remanded for trial.

2. Formation of "The Alliance."

In March, 1996, Shell and Texaco began discussions about consolidating their "downstream" operations in the United States. JA 75 (¶ 33).[9] SRI joined the discussions because of its partnership with Texaco in the Star Enterprise joint venture. JA 72, 75 (¶¶ 4, 34). The discussions resulted in the formation of Equilon on January 1, 1998, and Motiva on July 1, 1998. JA 73 (¶¶ 6, 7). The participants in the ventures referred to the overall combination of Equilon, Motiva, and related service companies as "The Alliance." 2 Record at 237-49; Pet. App. at 4a at n.2.

Prior to The Alliance, the major players in the United States gasoline market included six major oil companies (Shell, Texaco, Exxon, Mobil, Chevron, and Amoco), each of which had a relatively stable market share of from 6 to 8

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[8] References to Pet. App. are to the appendix to Texaco's certiorari petition filed in No. 04-805.

[9] "Downstream" operations are refining crude oil and marketing finished products. "Upstream" operations are exploration and crude oil production. JA 73 (¶ 12).

percent. 2 Record at 250-59. Shell, with a market share of 8 percent, had annual revenues of $18.3 billion; Texaco, with a share of 7 percent, had annual revenues of $18 billion. 2 Record at 259.

Before The Alliance, refining and marketing were profitable for both Shell and Texaco. 2 Record at 260-65. Each planned cost reductions to improve downstream competitiveness and profits. 2 Record at 266-67. Each believed, however, that in the absence of a combination like The Alliance, competition would force any cost savings each could independently achieve to be passed on to consumers. 2 Record at 278-94. Their solution was to stop competing and form The Alliance. JA 76, 77, 78 (¶¶ 42, 45, 58, 59); 2 Record at 295-313.

The Alliance was not a merger. Shell and Texaco continued as before, except for the specific assets contributed to The Alliance. 2 Record at 314-17. Just as they competed before The Alliance, they competed afterwards, unless specifically stated otherwise in written non-compete agreements. 2 Record at 318-402. They excluded from The Alliance all upstream business, and all non-United States refining and marketing. 3 Record at 445-51. They were permitted to acquire and operate refineries if The Alliance declined the opportunity. 3 Record at 435-44. They could continue importation of foreign oil; marketing of domestically produced unbranded fuel products The Alliance did not wish to market; trading in financial instruments; research and development; production and sale of aviation fuels, heavy fuel oils, coke, marine fuels, marine lubricants, sulfur, synthetic fuels, and natural gas; and solicitation of sales to customers located in the United States for delivery of products outside the United States. 2

Record at 130-34, 145-49, 180-85, 195-200, 403-12; 3 Record at 413-34. Where they agreed not to compete with The Alliance was the domestic sale of gasoline and related products.

Shell and Texaco retained ownership and control of their trademarks and brand names. JA 77-78 (¶¶ 52-56). Equilon and Motiva marketed the brands of gasoline under license agreements with Shell and Texaco. *Id.* The license agreements were in turn subject to "Brand Management Protocol" agreements, which required that both the Shell and Texaco brands be preserved, that they be treated equally, and that neither receive preferential treatment. *Id.*[10] A Brand Management Council of Shell and Texaco executives supervised use of the brands. *Id.*

At its formation, The Alliance had a market share of 15 percent of gasoline sales in the United States, double that of its next largest competitor. 3 Record at 470-78. In 39 states, The Alliance's share exceeded 10 percent; in 15 of those states, its share exceeded 20 percent; in three states, more than 30 percent. *Id.* On the West Coast, its share exceeded 25 percent. *Id.* The Alliance considered a 15 percent share to be a "minimum requirement for market leadership." 3 Record at 448.

Shell and Texaco agreed that The Alliance could be dissolved at any time by mutual consent, and unilaterally by either party after five years. JA 77, ¶ 51.

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[10] The Brand Management Protocols, requiring the brands to be treated equally, foreshadowed the price fixing imposed on The Alliance by Shell and Texaco. Viewed in the light most favorable to Respondents, as this evidence must be, the Protocols show that even before forming The Alliance, Shell and Texaco had agreed to fix prices, but waited to implement their agreement until after The Alliance was operational.

3. Shell and Texaco Control of The Alliance.

Members Committees consisting of Shell and Texaco executives, backed by support staffs at Shell and Texaco, governed The Alliance. 3 Record at 452-60; 4 Record at 664-88.[11] The Alliance agreements provided, "The Company Business shall be conducted by the CEO and other officers of the Company, subject to direction by, and in accordance with policies, business plans and budgets approved by" Shell and Texaco "acting by and through the Members Committee." 3 Record at 452-60. The agreements also required that "The Company Business shall be conducted in accordance with the Business Plan and the Annual Budget then in effect and the policies, strategies and standards established by the Members Committee." 3 Record at 461-69.

4. Fixing the Price of the Shell and Texaco Brands.

The Shell and Texaco brands of gasoline have always been separate and distinct products, each with its own unique package of additives. 4 Record at 711-26. The two brands have always been marketed to different customer segments, with Texaco customers tending to be more blue collar and rural, and Shell customers tending to be more affluent and urban. JA 79 (¶ 66). Consequently, Texaco-branded gasoline was generally sold at two cents below the price of other major brands, including Shell, which was a

[11] The Members Committee for Equilon consisted of four Shell representatives and three from Texaco; the Members Committee for Motiva consisted of two members each from Shell, Texaco, and SRI. *Id.*

"pricing leader." Deposition of Larry Burch, pp. 15, 69, 145-46[12]; 1 Appellees' Suppl. Record at SER 0096.[13]

Before The Alliance, Shell and Texaco pricing departments separately and independently set dealer tankwagon prices for their brands. JA 78-79 (¶ 62). With The Alliance's formation, the Shell and Texaco pricing departments moved into Equilon and Motiva, and continued to set prices separately for the two brands for the first eight months of The Alliance, until at least September of 1998. Deposition of Richard Broderick, pp. 24-44 (*see* footnote 4, *supra*). At that point, Shell and Texaco agreed to change the pricing.

Because they were required to conduct business "in accordance with policies, business plans and budgets approved by . . . the Members Committee," Equilon and Motiva in mid-1998 prepared business plans for review by Shell and Texaco. 3 Record at 509-50. A key part of their business plans was a so-called "Strategic Marketing Initiative" (3 Record at 517-50), which was ordered by Shell and Texaco at August, 1998, Members Committee meetings, 3 Record at 520-22; and reviewed at September,

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[12] These pages from the deposition of Mr. Burch are attached as pages DF 00110, DF 00120, and DF 00127-28 to Volume 1 of the Declaration of Counsel in Support of Defendants' Statement of Additional Facts Believed by Defendants to Be Uncontroverted (Submitted as Part of the Joint Stipulation of Uncontroverted Facts and Conclusions of Law), filed under seal in the district court on July 27, 2001 (Lower Court Docket Nos. 115-131). The certified record on appeal was filed with the Court of Appeals on August 22, 2003.

[13] References to ___ Appellees' Suppl. Record ___ are to the Appellees' Supplemental Excerpts of Record filed in the Ninth Circuit Court of Appeals on January 30, 2003. The initial number is the volume number, and the final number is the specific page in the Supplemental Excerpts of Record.

November, and December meetings. 3 Record at 509-19, 542-50.

The Strategic Marketing Initiative was "a look at how to move the . . . brands forward consistent with the brand protocol." 3 Record at 555. One of its "priorities" was "price optimization" or "align brand pricing," which was reviewed at the September meetings. At that time, Shell and Texaco directed Equilon and Motiva to charge the same dealer tankwagon price for the Shell and Texaco brands in each area in which the brands were priced. 3 Record at 509-16, 563-64.

The decision to fix the same price for the two brands was not merely a decision by Equilon management about pricing Equilon's products, as Shell and Texaco suggest in their briefs. It was a decision made by Shell, Texaco, and SRI for the entire Alliance, including both Motiva and Equilon, and a restraint on pricing freedom imposed on the entire Alliance. It was also a direct outgrowth of the Brand Management Protocols, executed by Shell and Texaco before forming The Alliance, in which they agreed that their brands would be "treated equally" in The Alliance. JA 78, ¶ 55.

In their pre-Alliance negotiations, Shell and Texaco knew that if antitrust regulators learned that they intended to fix prices, their proposed combination would face serious problems. Texaco executive Glenn Tilton, who sat on both Members Committees, said that Shell and Texaco could not discuss setting the same price for their brands before forming The Alliance "because of anti-trust concerns." 3 Record at 585.[14] Had the FTC learned of such a

[14] Shell had the same concerns. Before FTC review, "brand management" was not "fully developed due to Shell's fear that such discussions may have antitrust implications." Deposition of John Barnes, pp. 145-46. These pages from the deposition of Mr. Barnes are attached as

(Continued on following page)

discussion, it would have been on notice that Shell and Texaco wanted to combine so that they could fix prices and that their joint ventures were a cover for price fixing, which, of course, is exactly what occurred after The Alliance was approved and became operational.

Shell and Texaco ensured that the FTC had as little evidence as possible of their pre-Alliance discussions. An SRI memo produced in discovery disclosed that documents generated in the discussions were collected and destroyed at the end of meetings on the advice of counsel for Shell and Texaco. 1 Record at 22-26; JA 3. Evidence of any price fixing discussions that were part of the negotiations was thus destroyed and never submitted to the FTC for its review.[15]

After the Strategic Marketing Initiative was implemented, Equilon and Motiva set the same dealer tank-wagon price for both the Shell and Texaco brands in each

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pages DF 00029-30 to Volume 1 of the Declaration of Counsel in Support of Defendants' Statement of Additional Facts Believed by Defendants to Be Uncontroverted (Submitted as Part of the Joint Stipulation of Uncontroverted Facts and Conclusions of Law), filed under seal in the district court on July 27, 2001 (Lower Court Docket Nos. 115-131). The certified record on appeal was filed with the Court of Appeals on August 22, 2003.

[15] SRI prevailed on a motion to preclude use of this document as inadvertently produced and protected by the attorney-client privilege. The trial court ruled for SRI on the ground that advice of counsel for Shell and Texaco had been communicated to SRI "in the course of a matter of common interest and ... was designed to further that interest." *Id.* Respondents asked the court of appeals to reverse this unwarranted and erroneous extension of the attorney-client privilege. The court never reached the issue. If this Court affirms the court of appeals, Respondents respectfully ask this Court to reverse the lower court's ruling barring use of this document. *See, Continental Ore. Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 708-10 (1962).

of thousands of distinct pricing areas throughout the United States. JA 78-79 (¶¶ 62, 63).

Once the brands were priced identically, the price differential of the Texaco brand disappeared, rising to the level of the Shell brand, the pricing leader, and The Alliance sharply raised the price of both brands, even as crude oil prices were falling to historic lows. 3 Record at 490; 4 Record at 735-38; 3 Record at 586-87 (*see* footnote 6, *supra*). On September 1, 1998, the price of crude oil was stable at $12 per barrel, and fell below $10 per barrel during January and February of 1999. During this same period, Equilon raised prices for Shell and Texaco gasoline from $0.62 per gallon to $1.02 per gallon in Los Angeles, and from less than $0.60 to more than $0.90 per gallon in Portland and Seattle. In Chicago, Motiva raised brand prices from $0.55 to $0.75 per gallon. Generally, increases occurred where Equilon and Motiva had larger market shares, particularly on the West Coast. 3 Record at 586-87 (*see* footnote 6, *supra*).

Shell and Texaco justified forming The Alliance because of anticipated cost savings from their combination, estimated at $800 million per year. 4 Record at 699-705. These expected savings fell "into two buckets" – operating cost reductions from eliminating facilities and personnel that would become "redundant" because of The Alliance, and avoidance of capital expenditures Shell and Texaco would have made absent The Alliance. 3 Record at 604-05; 4 Record at 645-46. Regardless of whether these savings materialized, none were passed on to consumers

through lower prices, or intended to be. 4 Record at 649-63.

No efficiencies, cost savings, or competitive benefits resulted from charging the same price for the Shell and Texaco brands of gasoline, as executives of Shell, Texaco, and The Alliance testified:

Peter Bijur, Chief Executive Officer of Texaco:

Q. Did the pricing have anything to do with the cost savings?

A. No.

* * *

A. . . . Let me say something here with respect to this because I think this is important.

All the synergies, all of the cost savings and the figures which we calculated had nothing to do with pricing, nothing. [4 Record at 694-95.]

Texaco executive, Glenn Tilton:

Q. Okay. Are you aware of any cost savings or synergies that were anticipated as a result of charging the same prices for the brands in the same markets?

A. No. [4 Record at 705.]

Equilon Head of Marketing, John Darnley:

Q. Okay. Now, are you aware of any potential cost savings that were anticipated from charging the same price for the Shell and Texaco brands in the – in the same markets?

A. No. [4 Record at 703.]

Motiva Head of Marketing, Larry Burch:

Q. Okay. Now – and you mentioned that after the alliance was formed – after Motiva was formed, you implemented this policy of charging the same price for the Shell and Texaco brands in the same area?

A. Yes.

Q. Okay. Was there any cost savings or synergy that resulted from doing that?

A. No. [4 Record at 700-01.]

Motiva CEO, L. Wilson Berry:

Q. Are there any cost savings that you are aware of that are attributable to charging the same prices for the Shell and Texaco brands in the same pricing zones?

A. Not – not that I am aware of. [4 Record at 697-98.]

The Alliance developed no new products or processes that Shell and Texaco did not have as independent competitors. 3 Record at 479-89. The Alliance lasted only three years, ending in 2001 with Chevron's acquisition of Texaco.

5. The Court of Appeals' Decision.

The court of appeals reviewed a grant of summary judgment for Shell and Texaco. The district court originally denied a motion to dismiss, ruling that "price fixing can still be illegal *per se* even if it accompanies an efficient, integrated joint venture. If the joint venture could function perfectly well without price fixing, then the price fixing amounts to no more than an extraneous, anticompetitive restraint that does not merit rule of reason analysis." 1

Record at 14-15. After discovery, however, the district court granted summary judgment, finding that fixing the same prices for the Shell and Texaco brands did not violate Section 1.

Reversing the district court, the Ninth Circuit held that "whether the *per se* rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded." 369 F.3d at 1121, Pet. App. at 22a. The proper inquiry is whether the pricing restraint is "naked" or "ancillary." 369 F.3d at 1118, Pet. App. at 16a. Here, the court of appeals found:

> The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies.

369 F.3d at 1122, Pet. App. at 23a.[16] Accordingly, a jury could find the price fixing *per se* illegal. The case was remanded for trial.

The analysis of the court of appeals was correct and consistent with this Court's precedents, and should be affirmed.

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[16] The Court rejected two professed justifications advanced by Shell and Texaco: first, that fixing prices was compelled by *Robinson-Patman* compliance, a claim apparently abandoned in this Court; and, second, that applying the *per se* rule would improperly impede joint ventures in pricing their products, the position urged in this Court. 369 F.3d at 1122-25, Pet. App. at 22a-28a. The opinion did not discuss, nor did Petitioners raise, the argument that *Copperweld* protected their price fixing.

SUMMARY OF ARGUMENT

1. Procedurally, this case presents an appeal from a summary judgment. The evidence must therefore be viewed in the light most favorable to Respondents, the parties opposing the motion, and all permissible inferences drawn in their favor. Because they cannot prevail when the evidence is viewed in the light most favorable to Respondents, Petitioners ignore or misstate the evidence and improperly ask that inferences be drawn in their favor.

2. The illegality of the oil companies' price fixing is clear under the *per se* rule or the quick look rule of reason. Through joint ventures, Shell and Texaco created a combination through which they fixed prices, pooled profits, and suppressed competition. This case is on all fours with *Citizen Publ'g v. United States*, which no party suggests should be overruled, and the result should be the same, a Section 1 violation that is "plain beyond peradventure." This case also fits exactly the model for applying the rule of reason "in the twinkling of an eye" set out in footnote 39 of *NCAA v. Board of Regents*, a substantial restraint of trade with no procompetitive justification.

3. *Copperweld* should not be extended to joint ventures. This issue was not even raised in the court of appeals, and has been waived. Shell and Texaco are asking for a protected and special status that this Court has never recognized in its prior joint venture decisions, including *Citizen Publ'g*, *NCAA*, *Timken Roller Bearing*, *Sealy*, *Topco*, *Broadcast Music*, *Maricopa County Medical Society*, and *Indiana Federation of Dentists*. Extending *Copperweld* to joint ventures is unsupported by the facts of this case, contrary to the express language of that decision, in

conflict with every other joint venture decision of this Court, and bad antitrust policy.

4. The argument that Petitioners' price fixing did not affect competition, because competition had already ended with The Alliance's formation, is contrary to the evidence and this Court's precedents holding price fixing illegal, without the need for full rule of reason treatment, where there is neither apparent nor claimed procompetitive justification for a direct restraint on price.

5. The court of appeals decision in this case is sound in its analysis and consistent with all prior precedents and scholarship treating restraints involving joint ventures, including *Citizen Publ'g*, *NCAA*, *Timken*, *Sealy*, *Topco*, *Broadcast Music*, *Maricopa Medical Society*, and *Indiana Federation of Dentists*. The court of appeals decision also is in accord with this Court's decision in *California Dental Ass'n v. FTC*, and is a proper and unexceptional application of the naked-ancillary restraint doctrine propounded in *Addyston Pipe* more than a century ago, and followed by this Court and lower courts ever since.

6. Because this case presents a direct restraint on price, for which no procompetitive justification has been offered, the restraint violates Section 1, under either the *per se* or quick look rule. This Court has always viewed restraints on pricing as suspect and suitable for *per se* or quick look treatment, and has required such restraints to be justified by some procompetitive benefit. Here, Shell and Texaco presented none. *Per se* or quick look illegality is thus mandated in this case. The true nature of the combination is apparent from the evidence that the joint ventures produced no new products; the price fixing was totally unrelated to any purpose or claimed procompetitive benefit of the ventures, which could have functioned perfectly well without the price fixing (and in fact did so);

the price fixing was implemented eight months after the ventures' formation; and none of the claimed cost savings of the ventures were passed on to consumers, or intended to be.

7. *Per se* or quick look illegality in this case will not chill or create uncertainty in the formation of new ventures or the operation of existing ventures. Affirmance will leave the law exactly where it has been for more than a century: if joint venture participants place restraints on pricing, such restraints must be reasonably related to the procompetitive purposes and benefits of the joint venture in order to fall within the rule of reason. Joint ventures have been able to form and function under this rule since *Addyston Pipe*, and will continue to do so.

ARGUMENT

I. This Is an Appeal From Summary Judgment, in Which Respondents Are Entitled to Have the Evidence Viewed in the Light Most Favorable to Them.

The procedural posture in which this case comes to this Court involves review of a summary judgment. Accordingly, "[t]he evidence of the nonmovant [here Respondents] is to be believed, and all justifiable inferences are to be drawn in its favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *see, Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 and n.6 (1962); *see, also, Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 468-69 (1992).

These principles are important here, because Shell and Texaco misstate the record, improperly ask this Court to draw inferences in their favor, and dispute key findings

that must be accepted as true for purposes of this appeal.[17] These include, first, that Shell and Texaco required The Alliance to charge the same prices for the Shell and Texaco brands; and, second, that charging the same prices for the brands was unrelated to the claimed cost savings, efficiencies, and purposes of the joint ventures, which could have functioned and did function without the price fixing. The court of appeals found genuine issues of material fact on both points. The record supports these findings.

II. The Illegality of Petitioners' Price Fixing Is Plain Beyond Peradventure.

The *per se* illegality of Petitioners' price fixing is, as this Court found in *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135 (1969), "plain beyond peradventure." In *Citizen Publ'g*, this Court affirmed summary judgment for the Government in a Section 1 challenge to a joint venture of newspapers in Tucson, Arizona. The newspapers had entered into a joint operating agreement, establishing an "agency" in which they placed all operations except their news and editorial departments. The joint operating agreement included provisions that the newspapers would fix the agency's subscription and advertising prices, share in agency profits according to a fixed ratio, and not compete with the agency. 394 U.S. at 134. This Court found these restraints, all of which are present in this case, to be clear violations of Section 1. 394 U.S. at 135-36.

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[17] The various *Amici* more or less uncritically adopt the version of the facts in the briefs of Shell and Texaco, and thus commit the same errors in misstating the record.

Indeed, this case presents circumstances more aggravated and deserving of *per se* condemnation than did *Citizen Publ'g*. There, one of the newspapers was failing, and the joint operating agreement was allegedly necessary for its preservation. Here, the refining and marketing businesses of both Shell and Texaco were profitable and in no danger of failing. There, the joint operating agreement, with a term of 25 years, had a semblance of permanence. Here, Shell or Texaco could end The Alliance after five years. There, the price fixing was an overt and express term of the joint operating agreement. Here, the agreement was secret, hidden from regulators, and implemented only after The Alliance was established.

Unequivocally, *Citizen Publ'g* answers the "Question Presented" in this appeal. When Shell asks "[w]hether pricing decisions by a lawful joint venture or its owners with respect to the venture's own products may be condemned as a *per se* violation of Section 1," Shell Opening Brief, p. i, *Citizen Publ'g* says yes. Likewise, *Citizen Publ'g* answers yes to the Government's question, "Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a *per se* violation of Section 1 . . . when the joint venture's owners do not compete in the market for those products." Brief of the United States, p. i. This case is not novel or complicated. This Court faced exactly the same issues in *Citizen Publ'g* and found obvious violations. The result should be no different here.

Citizen Publ'g is directly on point and controlling. There is really no need to go further. If the oil companies wish to escape the authority of *Citizen Publ'g*, their remedy is to do what the newspaper industry did, obtain a special exemption from Congress. *See*, 15 U.S.C. §§ 1801-04.[18]

Besides asserting a *per se* claim, Respondents alleged that Petitioners' price fixing violated Section 1 under the "quick look" rule of reason, which permits a finding of illegality without the need to show market power in a relevant market, where there has been a naked restraint on price or output for which no procompetitive justification has been demonstrated, as here. *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459-61 (1986); Herbert Hovenkamp, *XI Antitrust Law*, ¶ 1911, pp. 296-97 (2d ed. 2005). Of particular relevance is footnote 39 in *NCAA*, in which this Court quotes with approval the following comments of Professor Areeda:

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[18] Petitioners and various *Amici* make unconvincing attempts to distinguish *Citizen Publ'g*. Significantly, no one (except perhaps the Washington Legal Foundation) suggests the case be overruled. Among the efforts to distinguish *Citizen Publ'g* are contentions that the newspapers did not fix the price of venture products, but only non-venture products (Texaco Brief, p. 31; Shell Brief, p. 21; this is incorrect; the newspapers fixed subscription prices and rates for advertising sold by the joint venture); that the joint venture restraints were illegal and the venture itself unlawful because the newspapers could not have successfully merged (Brief of the United States as *Amicus Curiae* Supporting Petitioners, pp. 19-20; this contention improperly requires proof of market power as an element of *per se* unlawful price fixing; also the decree, which was affirmed, allowed the venture to continue with "modification of the joint operating agreement so as to eliminate the price-fixing, market control, and profit-pooling provisions," 394 U.S. at 135); and that the degree of integration by the newspapers in their joint venture was insufficient to avoid the *per se* rule (Chamber of Commerce *Amicus* Brief, p. 14; this factor is never mentioned, except in Justice Harlan's concurring opinion). Because *Citizen Publishing* cannot be distinguished, most of the *Amicus* briefs avoid it altogether.

> "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful *per se*, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable' under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981).

The application of Professor Areeda's example to this case could not be clearer or more compelling. Like Ford and General Motors, Shell and Texaco were major factors in the gasoline market; their joint selling eliminated important price competition between them; they were quite substantial enough to distribute their products independently; and one can hardly imagine a procompetitive justification actually probable in fact or strong enough in principle to make their arrangement reasonable under Section 1. Certainly Shell and Texaco could not imagine a procompetitive justification that would make their price fixing reasonable, though given every opportunity to do so. Added to this were demonstrated market effects: enormous

price increases following the price fixing, although crude oil prices fell to historic lows. Quick look treatment is therefore also clearly warranted here.

III. *Copperweld* Should Not Be Extended to Joint Ventures.

The request of Petitioners and their *Amici* to extend *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), to joint ventures – an issue never raised in the court of appeals[19] – asks this Court to shift its paradigm in treating joint venture conduct. Until now, this Court has used the ancillary restraints doctrine under Section 1 of the Sherman Act, which posits that the venture's owners are separate actors, and asks whether venture restraints are ancillary to legitimate venture activity, even if they may affect price or output.

The oil companies invite this Court to abandon this for the alternative model of *Copperweld*, under which the venture must be treated as a single entity, and neither Section 1 nor the ancillary restraints doctrine applies to venture conduct. Instead, venture activities must be analyzed under Section 2, so that virtually every pricing decision by a joint venture, except perhaps predatory pricing, becomes lawful, because a single firm, unlike a group of firms, is free to set whatever price it wishes and reduce output accordingly.

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[19] Because Shell and Texaco did not raise their *Copperweld* argument in the court of appeals, this Court should hold the issue waived and not properly before it. *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 55-56, n.4 (2002); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 386, n.5 (1989).

Extending *Copperweld* would prevent courts from evaluating agreements on a case by case basis, with an "enquiry meet for the case," as this Court requires. *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999); *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 449, 466-67 (1992). Thus, in *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), this Court could find a price-fixing agreement unlawful without holding the medical foundation implementing the agreement to be unlawful. In *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984), this Court could condemn restrictions on telecasts of football games without holding the NCAA unlawful. In *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), this Court could proscribe a plan to withhold x-rays without finding a trade association unlawful. And in *Citizen Publ'g*, this Court could enjoin price fixing and profit pooling but "not prevent all forms of joint operation." 394 U.S. at 135.

Extending *Copperweld* to joint ventures would mean the end of evaluating particular restraints for reasonableness based on their competitive effects. Such a drastic shift in the law is unwarranted under this Court's precedents, the facts of this case, or sound antitrust policy.

A. No protected status for joint ventures.

This Court has a long history of applying the antitrust laws to joint ventures. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *NCAA v.*

Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

Throughout its decisions, this Court has abjured any special status for joint ventures. Where joint ventures have imposed anticompetitive restraints on price or output, not justified by procompetitive benefits, this Court has never found such restraints protected because the defendants structured their enterprise as a joint venture. As this Court said in *Timken*, 341 U.S. at 598, "Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled." In all its cases, this Court has treated joint ventures as combinations of competitors and analyzed the competitive effects, pro and con, of the restraints at issue.

Particularly apropos is this Court's comment in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940), repeated in *Maricopa County Med. Soc'y*, 457 U.S. at 346, "Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." That rule is, as this Court stated, " . . . price-fixing combinations which lack Congressional sanction are illegal per se . . . " 310 U.S. at 228.

B. Absence of evidentiary support.

As a factual predicate for extending *Copperweld*, Shell and Texaco repeatedly claim that the formation of The

Alliance "was a complete merger of the relevant businesses of the companies involved," "ended all competition in the relevant market between the founding companies," and eliminated Shell and Texaco as "independent centers of decisionmaking." Brief of Texaco, pp. 13, 15. The evidence, however, contradicts and fails to support these assertions. The formation of The Alliance was in no sense a merger, nor did it end all competition between Shell and Texaco or eliminate them as independent centers of decisionmaking.

Not only did Shell and Texaco keep their corporate identities, but also they retained their brand names and controlled The Alliance's marketing of products with those brand names. They also carved out numerous activities in which they retained the ability to compete with each other and The Alliance, including the sale of aviation and marine fuels and chemicals, and even the acquisition and operation of refineries The Alliance did not wish to operate itself. They maintained their separate international operations, such as gasoline marketing in Canada and Mexico, directly across the border from Alliance operations. To say that all competition was eliminated between Shell and Texaco is therefore false. What they eliminated was competition in the sale of domestic gasoline while The Alliance lasted.

Even as to domestic gasoline, they did not "end" competition. At most, they suspended it for the duration of The Alliance, which could be unwound at any time by mutual consent, and by either Shell or Texaco alone after five years. In actuality, The Alliance lasted only three years. Thus, this suspension of competition was easily reversible, was in fact easily reversed, and remained in place only so long as it served the interests of Shell and Texaco.

The ease of unwinding The Alliance, together with the retention of control over the brand names and their marketing, establishes that Shell and Texaco continued as independent centers of decisionmaking after forming The Alliance. Most telling is the nature of the pricing restraint itself. Shell and Texaco directly restrained the pricing freedom of Equilon and Motiva, but were able to offer no evidence of how this restraint served the interests of Equilon and Motiva. To the contrary, all executives testified that the pricing restraint had no connection with any claimed efficiencies, competitive benefits, or purposes of The Alliance. The interests being served by the price fixing were necessarily those of Shell and Texaco, which would be resuming domestic gasoline sales after The Alliance ended, and were continuing to sell other branded products, such as aviation fuel, while The Alliance lasted, as well as branded gasoline outside the United States. Thus, the contention that Shell and Texaco were not "independent centers of decisionmaking" is factually wrong.

The briefs of Petitioners and their *Amici* also try to minimize the scope of the restraint by treating this case as solely about Equilon and its pricing. This misrepresents both the nature and scope of the price fixing. The decision to fix the same price for the brands came from Shell, Texaco, and SRI. It included not only Equilon, which had been operating without the restraint for eight months, but also Motiva, which had just begun to do business. This was not a bottom-up decision by Equilon management; it was a top-down restraint agreed to by Shell, Texaco, and SRI, and imposed on their joint ventures. Viewed in this light, as it must be, *Continental Ore v. Union Carbide*, 370 U.S. at 710 (evidence of conspiracy must be viewed "as a whole"), this restraint was not the decision of a single

company, as envisioned by *Copperweld*, but an agreement among independent centers of decisionmaking reachable under Section 1 of the Sherman Act.

C. Absence of legal authority to extend *Copperweld*.

Copperweld, by its own terms, is a narrow decision: "We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." 467 U.S. at 767. This Court also expressly said that joint ventures "are judged under a rule of reason," 467 U.S. at 768, not that joint ventures are exempt from Section 1 as single firms. Cognizant that "§ 1's focus on concerted behavior leaves a 'gap' in the [Sherman] Act's proscription against unreasonable restraints of trade," 467 U.S. at 774-75, the Court was concerned over the extent to which its decision could widen that gap. The oil companies' requested extension of *Copperweld* to joint ventures would widen it to a chasm.[20]

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[20] Lower courts have generally recognized the limits of *Copperweld* and not extended it to joint ventures. *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147 (9th Cir. 2003); *Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 144 n.7 (4th Cir. 1990); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 215 (D.C. Cir. 1986); *Metropolitan Intercollegiate Basketball Ass'n v. NCAA*, 337 F. Supp. 2d 563, 570 (S.D.N.Y. 2004); *Centennial School Dist. v. Independence Blue Cross*, 1994 WL 62016, *5 (unpublished) (E.D. Pa. 1994); *McNeil v. National Football League*, 790 F. Supp. 871, 879-80 (D. Minn. 1992); *but see, City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 276 (8th Cir. 1988); *Healthamerica*

(Continued on following page)

In its decisions treating joint ventures, this Court has proceeded under Section 1, asking whether the restraints at issue were naked, *i.e.*, not reasonably related to any procompetitive purpose of the ventures, or ancillary, *i.e.*, reasonably necessary to achieve procompetitive venture purposes. If the former, this Court has applied *per se* or quick look treatment to find illegality. *E.g.*, *Timken*, 341 U.S. at 597-98; *Maricopa County Med. Soc'y*, 457 U.S. at 351-53; *NCAA*, 468 U.S. at 103-04. If the latter, this Court has required analysis under the full rule of reason. *E.g.*, *Broadcast Music*, 441 U.S. at 20-23; *California Dental Ass'n v. FTC*, 526 U.S. 756, 771-75 (1999).

What Petitioners propose, however, is a sea change in the law. If *Copperweld* applies to joint ventures, then Section 1 will not. Instead, *Copperweld* will require courts to draw lines and make fine distinctions over what degree of integration by joint venturers is sufficient to convey *Copperweld* protection, and what degree insufficient. Joint ventures come in all shapes and sizes and involve varying degrees of integration. This will create far more uncertainty than under the present state of the law, which provides more than adequate guidance for deciding when joint venture conduct has transgressed Section 1.

In addition, extending *Copperweld* to joint ventures would have a destabilizing effect on the precedential value of prior joint venture decisions by this and other courts. For example, if *Copperweld* applies to joint ventures, all of the analysis in *Broadcast Music* could become dictum; given a finding of sufficient integration, the blanket license would not be subject to Section 1 at all. The same

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Pennsylvania, Inc. v. Susquehanna Health Sys., 278 F. Supp. 2d 423, 434-37 (M.D. Pa. 2003).

could be said for *Timken*, *Citizen Publ'g*, *Topco*, *Maricopa County Med. Soc'y*, *NCAA*, and *Indiana Fed'n of Dentists*. Indeed, to preserve the rationale in these cases, a court would have to find *Copperweld* inapplicable before it could even look at the analysis of effects on competition, which is the real basis of each decision.

D. Against sound public policy.

As a matter of sound policy, extending *Copperweld* to joint ventures also makes no sense. Professor Hovenkamp has persuasively articulated the grounds for not doing so. Hovenkamp, *XIII Antitrust Law*, ¶ 2101 (2d ed. 2005). First, an agreement by separate firms reducing output or increasing price may be enjoined without involving the "ongoing price regulation and monitoring" associated with enjoining conduct by a single firm. Second, for a joint venture, a structural remedy is always practicable and "requires the tribunal only to enjoin the venture or else those terms of the venture posing the anticompetitive threat."[21] Third, unlike a single firm, which may have lawfully attained monopoly power, "the group of firms that eliminates price or innovation competition among themselves need not have been the first or wisest at anything," and there is little prospect of punishing firms that have been "the first, the most aggressive, or the most sagacious." Finally, "the joint venture is usually not essential

[21] An injunction in this case could have prohibited Shell and Texaco from requiring The Alliance to charge the same price for the two brands in the absence of proof that such pricing was reasonably necessary to achieving some legitimate purpose of The Alliance (a showing never made), just as the decree in *Citizen Publ'g* allowed the joint operating agreement to continue, but required its modification to exclude the practices violating Section 1, including price fixing. 394 U.S. at 135.

and can be regarded as the exceptional method of enterprise organization." Hence "injunctions against anticompetitive joint venture rules represent a far more modest intrusion into an economy that we presume to be efficient overall." *Id.*, at pp. 20-22.

Extending *Copperweld* to joint ventures would also create difficulties for private and public antitrust enforcement. This Court has observed, "'the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat' to deter antitrust violations." *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). Extending *Copperweld* to joint ventures will restrict private plaintiffs to claims challenging the initial formation of the venture, in which they must prove the venture's very existence unlawful through a full rule of reason or Section 7 showing.

The burden on public enforcement will be at least as great as that on private plaintiffs. The Government, in reviewing whether to permit joint ventures, will have to anticipate every conceivable restraint in which the venture could engage post-formation, or else lose its ability to challenge the restraints when they occur.[22] At present, both the FTC and the Justice Department treat joint ventures as falling within Section 1. The *Antitrust Guidelines for Collaborations Among Competitors*, Issued by the Federal Trade Commission and the U.S. Department of Justice, April 2000, do not even discuss *Copperweld*.

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[22] This Court has noted the limited resources available to the Government for antitrust enforcement. *Hydrolevel*, 456 U.S. at n.10; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

Section 2.4 of the *Guidelines* allows the Government to challenge restraints imposed after a venture's formation, as it did successfully in *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). Extending *Copperweld* to joint ventures will curtail such challenges and impede the Government's ability to attack *per se* illegal conduct.

Finally, there is the decision by Shell and Texaco to structure their combination using joint ventures. Had Shell and Texaco truly wanted to be a single entity, with *Copperweld* protection, they could have merged, as they well knew. Instead, they concluded that joint ventures, which could be easily unwound, best served their interests. Their decision and its consequences ought to be respected. *Citizen Publ'g*, 394 U.S. at 141 (concurring opinion of Harlan, J.):

> In other words, if the agreement had been only slightly different it is arguable that we would have had no choice but to treat the transaction in the same way we would treat a total corporate merger. However this may be, I do not understand why the parties' decision to retain the advantages of flexibility should not be decisive for our purposes. If businessmen believe, after considering all the relevant factors, that future events may deprive their existing arrangements of utility, there is no reason why the antitrust laws should not view the transaction in a similar way.

IV. It Is Incorrect to Argue That Fixing the Price of the Shell and Texaco Brands Could Not Have Restrained Competition, Because Competition Between Shell and Texaco Had Already Ended.

As a matter of both fact and law, it is untrue that no restraint on competition resulted from fixing the prices of the Shell and Texaco brands because all competition

between Shell and Texaco had already ended with the formation of The Alliance.

A. Errors of fact.

When The Alliance was formed, all competition between Shell and Texaco did not end. Even for domestic sales of gasoline, competition was at most *suspended*, not ended, so long as its suspension was in the interests of Shell and Texaco. Shell and Texaco also continued to control The Alliance's marketing of products bearing their brands. Shell could have directed Shell-branded gasoline to be marketed by The Alliance in any manner Shell deemed in its overall best interests, as could Texaco with its brand. The Alliance, however, was not free to promote either brand in its own best interests in any way that did not have its owner's approval. Thus, even had The Alliance deemed it advantageous to offer either brand as a discount brand, or discontinue either brand, it could not have done so. The applicable noncompete agreements also carved out numerous exceptions permitting competitive activities outside The Alliance by Shell and Texaco. To say that all competition had ended is therefore incorrect.

Nor is it factually accurate to say that fixing the price of the brands could not have resulted in a further restraint on competition. Fixing the price meant that when The Alliance ended, as it did after only three years, Shell and Texaco resumed their "competition" charging the same prices for their branded gasolines. This state of play, which was a direct result of price fixing through The Alliance, facilitated future collusion and price uniformity. Likewise, while The Alliance existed, having identical prices for Shell and Texaco products inside The Alliance facilitated price uniformity for products outside The Alliance, such as

aviation fuel, which Shell and Texaco continued to market. Finally, fixing the same prices for the brands was a direct restraint on the ability of The Alliance to compete, and Shell and Texaco have failed to offer any explanation as to how this restraint was in The Alliance's interest.

B. Errors of law.

The restraint, moreover, was a direct restraint on price. Where an agreement directly affects prices, this Court has generally seen no need to inquire further about any effect on competition, and has treated the agreement as *per se* unlawful, even in joint ventures. *Citizen Publ'g.*, 394 U.S. at 134-35; *Timken Roller Bearing*, 341 U.S. at 597-98; *Maricopa County Med. Soc'y*, 457 U.S. at 343-57; *see, also, Topco*, 405 U.S. at 609-10. As this Court said in *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958), and reiterated in *Maricopa*, 457 U.S. at 351, the rationale for *per se* rules is in part to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken"; and one for which "courts are ill-equipped and ill-situated," *Topco*, 405 U.S. at 611-12; *see, also, FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 435 (1990), quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-26, n.59 (1940) ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness."); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980). This Court's rule has been since at least 1940 that "price-fixing combinations which lack Congressional sanction are illegal per se." *Socony-Vacuum,*

310 U.S. at 228 ("Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive." *Id.* at 221-22).

It is also misguided to claim that cessation of competition between Shell and Texaco is a factor favoring rule of reason treatment. Under *Maricopa County*, *Citizen Publ'g*, and *Broadcast Music*, the law is exactly the opposite. In *Maricopa County*, the price fixers sought to bring themselves within the authority of *Broadcast Music* by arguing that their price fixing was part of a procompetitive joint venture making available a new product, and involved "price fixing in only a literal sense." 457 U.S. at 355. This Court rejected the argument and distinguished *Broadcast Music* because, in making a new product available, "the blanket-license arrangement did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price." 457 U.S. at 355. Individual competition by venture participants constrained the joint venture's price fixing, because customers were free to deal with individual composers regarding individual compositions.

Thus, Petitioners should not escape *per se* treatment because they renounced competition with The Alliance that might otherwise have mitigated the effects of their price fixing. In *Citizen Publ'g*, such non-compete agreements were held to be a Section 1 violation "plain beyond peradventure," 394 U.S. at 135; while in *Broadcast Music*, where there were none, this Court found potential competition by composers to be an important factor favoring the rule of reason. Thus, the non-compete agreements between Shell and Texaco made their price fixing more appropriate for *per se* treatment, not less.

To exempt Petitioners from antitrust scrutiny for price fixing through The Alliance further strays from this Court's precedents by permitting a direct restraint on price without requiring any actual or apparent procompetitive justification. Here, although given every opportunity, Shell and Texaco failed to advance any procompetitive benefit or otherwise justify their price fixing as related to the claimed cost savings, efficiencies, or purposes of The Alliance. There is neither precedent nor policy to relieve them of that burden.

The Court has said, "Legal presumptions that rest on formalistic distinctions, rather than actual market realities, are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record,'" *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 466-67 (1992), and their effects on competition and "whether or not the challenged restraint enhances competition." *California Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999). Consequently, in every case in which this Court has considered a joint venture restraint, it has required a showing of procompetitive benefits in order to validate the restraint. *Broadcast Music*, 441 U.S. at 19-24; *NCAA*, 468 U.S. at 103-04, 109-10; *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 690-95 (1978); *Indiana Fed'n of Dentists*, 476 U.S. at 459-61.

In *Broadcast Music*, this Court denied *per se* treatment for blanket licensing of musical compositions, because the Court found that blanket licensing was integral to creation of "a different product," which carried with it substantial procompetitive benefits. 441 U.S. at 22-23. This Court observed, "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price

is necessary to market the product at all." 441 U.S. at 23. Here, the price-fixing agreement was not necessary to market the product at all. Equilon did so for the first eight months of its existence and Motiva for its first two months without the agreement. Nor did The Alliance produce any new product, as did ASCAP, BMI, and virtually every other joint venture whose practices have not transgressed the antitrust laws.

In commenting on *Broadcast Music* in *NCAA*, this Court observed, "While joint ventures have no immunity from the antitrust laws, as *Broadcast Music* indicates, a joint selling arrangement may 'mak[e] possible a new product by reaping otherwise unattainable efficiencies.' . . . In *Broadcast Music*, the availability of a packaged product that no individual could offer enhanced the total volume of music that was sold." 468 U.S. at 113-14. Here, there was neither a new product nor any other product that Shell and Texaco could not have produced and sold individually, and were not selling and producing individually outside the ventures.

In *NCAA*, which held restraints on college football telecasts to violate Section 1 under the quick look, this Court stated that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." 468 U.S. at 110. At that time, as the Court noted, the Government agreed:

> The Solicitor General correctly observes:
>
> "There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found . . . the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the

> controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. . . ."

Id., n.42. Likewise, in *Indiana Fed'n of Dentists*, this Court found illegality under the quick look for a restraint on output "[a]bsent some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services." 476 U.S. at 459.

Thus, where participants in a joint venture have imposed a direct restraint on price or output, with demonstrably anticompetitive effects for consumers, as here, this Court has always required some showing of a procompetitive justification for the restraint to avoid *per se* or quick look condemnation. Any suggestion that this Court depart from this well-established rule just because a venture has reached some specified level of integration should be rejected.[23]

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[23] The argument also suffers from the same infirmity of application as the request to extend *Copperweld* to joint ventures, inasmuch as such a rule would inject a new level of uncertainty into antitrust jurisprudence by requiring litigants to guess and courts to decide what degree of integration is sufficient to avoid *per se* or quick look condemnation.

V. The Court of Appeals Properly Followed and Applied the Precedents of This and Other Courts in Analyzing the Pricing Restraint Imposed by Shell and Texaco on The Alliance, and in Treating the Restraint as a *Per Se* Violation of Section 1.

A. Analysis of pricing restraints by joint ventures.

Requiring a substantial procompetitive justification for price and output restraints in a joint venture follows from *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899), which treats such restraints as either ancillary, *i.e.*, reasonably necessary to achieve the lawful purposes of the joint venture, or naked, *i.e.*, having no such connection to the venture's purposes.

Every significant lower court joint venture decision has followed this Court's directive in requiring a procompetitive justification for restraints on price and output, generally by requiring a showing that any such restraint is ancillary, rather than naked. *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214, 224, 229 (D.C. Cir. 1986); *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 599, 601, 603 (11th Cir. 1986); *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 370-71 (7th Cir. 1987); *Law v. NCAA*, 134 F.3d 1010, 1021-24 (10th Cir. 1998); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001); *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 59 (1st Cir. 2002); *Freeman v. San Diego Bd. of Realtors*, 322 F.3d 1133, 1151

(9th Cir. 2003). Where there is no showing the restraint is ancillary, courts find *per se* or quick look illegality, as in *General Leaseways*, *Premier Electrical Constr.*, *Law*, and *Freeman*. Where there is, courts uphold the restraint under the rule of reason, as in the remaining cited cases, a factor that distinguishes each of these decisions from this one.

This, of course, is exactly the approach followed here by the court of appeals in asking whether "setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors . . . is reasonably necessary to further the legitimate aims of the joint venture." 369 F.3d at 1121 (Pet. App. at 21a).

As summarized by Professor Hovenkamp, *XI Antitrust Law*, ¶ 1908b at 253 (2d ed. 2005):

> **Relevance of inclusion in presumptively efficient joint venture or other transaction.** Determining ancillarity requires the tribunal to consider *first*, whether any aspect of the defendants' [footnote omitted] association contains a significant promise of integration or cooperation yielding an increase in output. *Second*, some determination must be made whether the challenged agreement is an essential part of this arrangement, whether it is important but perhaps not essential, or whether it is completely unnecessary.

Consequently, "clearly some restraints are 'part' of efficiency-creating joint ventures and yet not sufficiently integral to the venture so as to be classified as ancillary." *Id.* at p. 259. Moreover, "express limitations on price require a close examination to ensure that they really are

essential to an efficiency-producing joint venture." *Id.* at p. 264.

Professor Hovenkamp also notes that the timing of the restraint relative to the venture's formation may bear on whether the restraint is naked or ancillary. Restraints that are "tacked on after the underlying agreement has already been completed" are not intended to "facilitat[e] an output-increasing transaction," and are therefore not ancillary. *Id.*, Section 1908g at p. 275. Here, of course, although they may have secretly agreed beforehand, Shell and Texaco actually imposed their pricing restraint well after the execution of their joint venture agreements, when Equilon had been operating for eight months and Motiva for two without the restraint. This evidence strongly supports the court of appeals' conclusion that the restraint was naked, not ancillary, especially in light of the failure of Shell and Texaco to offer any procompetitive justification.[24]

Not surprisingly, some commentators view the court of appeals' decision "[a]s a case that applies these appropriate generally accepted standards," which "was correctly decided on its current record and should not be considered controversial. It provides helpful guideposts to the types of joint venture activities that trigger antitrust concerns." Bruce D. Sokler, Yee Wa Chin & Katherine E. Walsh, *A Consideration of Dagher and the Antitrust Standard for Joint Ventures*, 1 NYU Journal of Law and Business 307, 321 (2004). This article adds:

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[24] *See, also, Freeman v. San Diego Board of Realtors*, 322 F.3d at 1144; *In re Polygram Holding, Inc.*, Docket No. 9298 (FTC), available at http://www.ftc.gov/os/2003/07/polygramopinion.pdf, pp. 10, 54-58, *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

> In the case of joint venture pricing activities that are not properly ancillary to the venture's legitimate purposes, *per se* illegality may result. From this perspective, *Dagher* is in the mainstream of antitrust jurisprudence and breaks no new ground. The result in *Dagher* represents an unsurprising application of generally accepted antitrust standards to competitor joint ventures. [*Id.*]

B. Application of the *per se* or "quick look" rule.

The court of appeals also properly deemed the restraint to be *per se* illegal under this Court's precedents. Even if the *per se* rule were inapplicable, however, there can be no doubt of the restraint's illegality under the quick look. *Citizen Publ'g* is of course directly on point in its application of the *per se* rule, as are *Timken* and *Maricopa County Med. Soc'y*, both of which involved joint venture price fixing. *See, also, Topco*, 405 U.S. at 609; *Sealy*, 388 U.S. at 354-56.

The analysis by the court of appeals in this case was, however, much more nuanced than a perfunctory application of the *per se* rule, and fully consistent with this Court's joint venture decisions. The court of appeals did not conclude that simply because literal price fixing had occurred, *per se* proscription was appropriate. To the contrary, it examined the degree of integration of the joint ventures and the nature and extent of resulting procompetitive benefits, here claimed cost savings. The court then properly asked whether the restraint on pricing was "reasonably necessary to further the legitimate aims" of the ventures. 369 F.3d at 1121 (Pet. App. at 21a). Only when that question was answered conclusively in the negative, by the testimony of Shell and Texaco executives, did the court find *per se* treatment appropriate. Even then,

the court remanded for trial, at which Shell and Texaco will again have the opportunity to show some nexus between their price fixing and the legitimate aims of their ventures.

The methodology employed by the court of appeals closely tracks that of this Court starting with *Broadcast Music*, where this Court observed, "Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements *reasonably necessary* to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act." 441 U.S. at 19; emphasis added. The Court then looked to see whether the blanket license was "a naked restrain[t] of trade with no purpose except stifling of competition," or rather accompanied "the integration of sales, monitoring, and enforcement against unauthorized copyright use" and made possible a new product, "a market in which individual composers are inherently unable to compete fully effectively." 441 U.S. at 20-23. Having found the latter, this Court then held *per se* treatment inappropriate. Here, however, as in *Citizen Publ'g*, there was no new product, no procompetitive justification, and no individual competition by the venture owners to mitigate the effects of their price fixing. *Per se* treatment was thus mandated.

In *NCAA*, although this Court declined to apply the *per se* rule because the case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all," 468 U.S. at 100, the Court nonetheless concluded that it could apply the quick look to invalidate restraints on "price and output" that had "a significant potential for anticompetitive effects," 468 U.S. at 104, when the venture was unable to offer "some

competitive justification" for the restraints. This Court said:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," [*Nat'l Soc'y of*] *Professional Engineers* [*v. United States*], 435 U.S. [679] at 692, 98 S. Ct., at 1365. . . . We have never required proof of market power in such a case. [Footnote omitted.] This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

468 U.S. at 110. In *Indiana Fed'n of Dentists*, this Court applied the same principles it had used in *NCAA* and held that, under the quick look, an agreement among Indiana dentists to withhold x-rays violated Section 1 in the absence of "some competitive justification." 476 U.S. at 459-60.

The court of appeals here followed these same rules in dealing with the oil companies' restraint on price. In the absence of some competitive justification – which the oil companies failed and refused to provide – the court quite properly found the restraint to be illegal without the need for further inquiry. Although the court of appeals termed the restraint *per se* illegal and declined to reach the quick look, the result would have been exactly the same under the quick look, given the direct restraint on price and the absence of justification.

Finally, the court of appeals' decision is consistent with this Court's analysis in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), in which this Court rejected quick look treatment for restrictions on false or misleading discount advertising. This Court stated that although quick look analysis was appropriate where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," 526 U.S. at 770, this was not such a case because the "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," in that the restrictions on advertising were, "at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient." 526 U.S. at 771 (footnote omitted).

The Court noted, as it had in *NCAA*, "there is often no bright line separating *per se* from Rule of Reason analysis." 526 U.S. at 779. The Court approved the appropriateness of both *per se* and quick look condemnation of restraints depending on the facts of the particular case, but found such condemnation inappropriate in the case before it, which involved restraints that on their face "furthered the 'legitimate, indeed procompetitive, goal of preventing false and misleading price advertising.'" 526 U.S. at 773.

In this case, however, fixing the same price for the Shell and Texaco brands in no sense facially appears to further any legitimate or procompetitive goal. To the contrary, when asked, every oil company witness expressly disclaimed any such legitimate or procompetitive justification. These disavowals, uncontradicted in the record, left the court of appeals to consider a direct restraint on price

with no apparent or claimed procompetitive justification, but with demonstrable anticompetitive market effects. On this record, following this Court's decisions, the court of appeals could conclude only that such a restraint was *per se* unlawful, or, at the least, unlawful under the quick look rule of reason.[25]

The Government itself engages in exactly this type of analysis of joint ventures. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005):

> We therefore accept the Commission's analytical framework. If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive

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[25] The court of appeals' decision was also fully in accord with the analytical framework articulated in the dissent in *California Dental*. The dissent described its analysis as embodying "four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?" 526 U.S. at 782. The specific restraint at issue here, termed the most important consideration, was fixing the same price for the Shell and Texaco brands. Its likely and actual anticompetitive effects were "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940), which "is illegal per se." *Id.* There were no offsetting procompetitive justifications. In such a situation, this Court has not required an inquiry into whether there is sufficient market power to make a difference, although the record in this case shows beyond question that there was such market power, as evidenced by the ensuing price increases (*e.g.*, from $0.62 to $1.02 cents per gallon in Los Angeles). Under either the majority opinion or dissent in *California Dental*, the restraint in this case merited, if not required, summary condemnation, whether under the *per se* rule or the quick look.

> benefit that plausibly offsets the apparent or anticipated harm. That much follows from the case-law; for instance, in *NCAA* the Court held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."

The court of appeals employed comparable reasoning here. Presented with a direct restraint on price and demonstrable anticompetitive effects, the court required Shell and Texaco to "identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm." Shell and Texaco did neither. Nor could they, first because the price restraint was unrelated to the purposes or claimed cost savings of their ventures, and second because the cost savings were never passed on and provided no benefit to consumers in any event. 4 Record at 649-63.[26]

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[26] Although this Court has stated that maximizing consumer welfare is a primary purpose of the antitrust laws, *e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), this Court has also expressly ruled that claimed cost savings are not a sufficient justification for an otherwise unlawful combination. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967). When lower courts have considered such an efficiency or cost-saving defense, they have generally required some showing that any claimed cost savings will ultimately be passed on to consumers. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.D.C. 2001); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1088-89 (D.D.C. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1300-01 (W.D. Mich. 1996); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1084-85 (D. Del. 1991); *California v. American Stores Co.*, 697 F. Supp. 1125, 1132-33 (C.D. Cal. 1988), *aff'd in part and rev'd in part on other grounds*, 872 F.2d 837 (9th Cir. 1989), *rev'd*, 495 U.S. 271 (1990); *United States v. Long Island Jewish Med. Cntr.*, 983 F. Supp. 121, 148-49 (E.D.N.Y. 1997) ("The second prong of the 'efficiencies' analysis is whether these savings would be passed on to the consumers."). Under the current state of the law and the undisputed evidence that Shell and Texaco

(Continued on following page)

Petitioners and their various *Amici* try in vain to distinguish the joint venture decisions of this Court and lower courts by arguing (1) that no case has ever found a joint venture's pricing of its own products to be unlawful; and (2) that joint venture restraints have been unlawful only when the formation of the venture itself was illegal, the joint venture was an insufficient integration of its owners, the restraints suppressed competition by venture owners outside of the joint venture, or the restraints resulted in an unlawful combination between the venture and other entities or actors. The first proposition is wrong, however, and not a single decision of this or any other court has ever drawn the distinctions urged by the second proposition.

A number of the decisions themselves involve restrictions on pricing the venture's own products. For example, in *Citizen Publ'g*, the joint venture participants fixed the

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never passed on any of their claimed cost savings to consumers, and never intended to do so, Respondents submit that the court of appeals was incorrect in observing, "[t]here is a voluminous record documenting the economic justifications for creating the joint ventures." 369 F.3d at 1111. At most, Shell, Texaco, and SRI perceived sufficient business justifications for combining, which were in their own individual interests, but not in the interests of consumers. Respondents have never conceded that the formation and existence of the ventures themselves were in any way lawful. Given that their sole justification was claimed cost savings, which this Court has never recognized as a sufficient justification for an unlawful combination; that the nature of the cost savings resulted not from any true efficiencies in the sense of being able to produce a new product or engage in a new means of production that Shell and Texaco could not have achieved individually; and that the record shows neither passing on nor an intent to pass on any of the claimed cost savings; Respondents submit that there is no basis for finding the formation or existence of the ventures to be lawful, or their claimed cost savings to justify the decision to charge the same price for the Shell and Texaco brands, which Petitioners concede to be unrelated to their claimed cost savings.

rates for the advertising space and subscriptions being offered by the venture. In *Broadcast Music*, the restraint at issue was the price set for the blanket license offered by the joint ventures. *Per se* illegality was rejected only because the blanket license was a new product for which it was necessary to set some price, unlike here where no new product was offered, and because individual composers remained free to offer individual licenses, unlike here where Shell and Texaco agreed not to compete with their ventures. In *Freeman v. San Diego Bd. of Realtors*, the restraint held *per se* unlawful was fixing the price defendants' joint venture would charge members for its services.

Thus, Petitioners' distinctions simply do not hold up, nor should they. Notwithstanding claims of enhancement of the national welfare by joint ventures – a familiar and long-standing argument of antitrust violators, which this Court has consistently rejected, *e.g.*, *Topco*, 405 U.S. at 609-10; *National Soc'y of Prof. Eng'rs*, 435 U.S. at 688-89 – joint ventures always have presented fertile ground for collusion and anticompetitive restraints. As Professor Hovenkamp has observed:

> By contrast to unilateral actions, joint ventures and other joint conduct provide greater opportunities for anticompetitive behavior. Unlike predation, which may be an expensive investment taking many years, joint ventures can be formed as quickly as cartels can, and often they can be quickly abandoned if they do not work out as planned. The opportunity to earn monopoly profits for just a few months or a year may be a sufficient motive to form a joint venture facilitating collusion.

Hovenkamp, *XIII Antitrust Law*, ¶ 2103, p. 29 (2d ed. 2005); *see, also, General Leaseways*, 744 F.2d at 594. Professor Hovenkamp's comments could not apply more directly to the facts of this case, and argue persuasively

against the special dispensation Shell and Texaco seek for their price fixing.

VI. The Decision of the Court of Appeals, if Affirmed, Will in No Way Impede the Lawful Activities of Joint Ventures.

Finally, this Court should reject "the sky is falling" arguments of Petitioners and their *Amici* that affirmance of the court of appeals will chill and cast a lasting pall over the future lawful formation and operation of joint ventures. This case presents a direct restraint on price, for which no justification has been offered, unnecessary to the effective functioning of the subject joint ventures. No decision of this or any other court has ever countenanced such a restraint.

Significantly, the court of appeals' decision itself provides more than ample guidance as to how joint ventures may lawfully operate without running afoul of the *per se* rule:

> The result we reach here allows joint ventures to set prices for their products within the limits of the Sherman Act. Our analysis would be different if we confronted a joint venture in which former competitors agreed jointly to research, produce, market, and sell a new product, or a joint venture in which competitors agreed to merge their current product lines into one collective brand. Nor would we necessarily reach the same result if the defendants had independently decided to charge the same price for Texaco and Shell gasoline after conducting separate price analyses for each brand, or had they come forward with persuasive evidence that the setting of a single, fixed price was important to accomplish the legitimate aims of the joint ventures.

369 F.3d at 1124 (Pet. App. at 27a). Thus, joint venture participants need do nothing more than innovate and produce a new product, or justify the reasonable necessity for their pricing actions by showing a nexus with the purposes or procompetitive benefits of their ventures. Here, Shell and Texaco did neither. Present and future joint venture participants can surely learn from the misdeeds of Shell and Texaco without undue difficulty.

CONCLUSION

Respondents respectfully request this Court to affirm the court of appeals, or, alternatively, to dismiss the writ of certiorari as improvidently granted.

Dated: November 10, 2005

Respectfully submitted,

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Nos. 04-805 and 04-814

DEC 15 2005

IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

ARGUMENT 2

I. SECTION 1 OF THE SHERMAN ACT DOES NOT APPLY 2

II. EVEN IF SECTION 1 APPLIES, THE PER SE RULE DOES NOT 9

III. THE ANCILLARY RESTRAINTS DOCTRINE IS IRRELEVANT HERE 13

IV. "QUICK LOOK" ANALYSIS DOES NOT APPLY HERE 14

V. RESPONDENTS HAVE DISTORTED THE FACTUAL RECORD 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Maricopa County Med. Soc'y,
457 U.S. 332 (1982) ..... *passim*

Augusta News Co. v. Hudson News Co.,
269 F.3d 41 (1st Cir. 2001) 10

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,
441 U.S. 1 (1979) 6, 7, 12

California Dental Ass'n v. FTC,
526 U.S. 756 (1999) 14

Citizen Publ'g Co. v. United States,
394 U.S. 131 (1969) ..... *passim*

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984) 2, 4

Freeman v. San Diego Ass'n of Realtors,
322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003) 13

FTC v. Indiana Federation of Dentists,
476 U.S. 447 (1986) 5, 6

NCAA v. Board of Regents,
468 U.S. 85 (1984) 4, 6

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,
472 U.S. 284 (1985) 10

Polygram Holding, Inc. v. FTC,
416 F.3d 29 (D.C. Cir. 2005) 14, 17

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986) 10

State Oil Co. v. Khan,
522 U.S. 3 (1997) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Timken Roller Bearing Co. v. United States,
341 U.S. 593 (1951).....6, 10
United States v. Sealy, Inc.,
388 U.S. 350 (1967).....6
United States v. Socony Vacuum Oil Co.,
310 U.S. 150 (1940).....6
United States v. Topco Assocs.,
405 U.S. 596 (1972).....6, 10

OTHER AUTHORITIES

PHILLIP E. AREEDA & HERBERT HOVENKAMP,
Antitrust Law (2d ed. 2003).....5, 11

INTRODUCTION

Respondents admit the fundamental fact that, with the formation of the Equilon and Motiva joint ventures, Shell- and Texaco-branded gasoline was manufactured, wholly owned and solely marketed by these ventures. Shell and Texaco no longer competed "in the sale of domestic gasoline." Brief for Respondents 25. Instead, they pooled their capital and shared the risks of loss and the opportunities for profit. This fundamental fact means that Shell and Texaco had a complete unity of interests with respect to the pricing of Shell- and Texaco-branded gasoline in the United States and that, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), Section 1 of the Sherman Act should not apply to the pricing decisions at issue here. As this Court stated in *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the market." *Id.* at 356.

This fundamental fact also means that, even if Section 1 did apply, the per se rule should not, because a decision about the relative prices of the two brands could not restrict competition that would otherwise exist. Respondents rely principally upon their broad reading of *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969). But Respondents do not and cannot dispute that the joint venture in *Citizen Publ'g* involved joint pricing of products that were not wholly owned by the purported joint venture. Respondents also do not and cannot dispute that, in the three and one-half decades since *Citizen Publ'g*, this Court has rendered decisions that are flatly inconsistent with their reading of it.

Of necessity, a manufacturing and marketing joint venture must set prices for the products it owns and sells; indeed, Respondents do not dispute that it was legal for Shell and

Texaco to unify the pricing *function* for the two brands under the control of each venture, overseen by that venture's owners. Respondents also do not dispute that the actual pricess set for the two brands should be irrelevant to the Section 1 analysis. What flows ineluctably from these undisputed principles is that, contrary to the Ninth Circuit's holding, particular decisions regarding pricing and pricing strategies for a joint venture's own products cannot be condemned as per se illegal price fixing, and particular pricing decisions need not be individually justified under the ancillary restraints doctrine.

ARGUMENT

I. SECTION 1 OF THE SHERMAN ACT DOES NOT APPLY.

In *Copperweld*, this Court reasoned that Section 1 of the Sherman Act should not apply to the joint conduct of entities that have "a complete unity of interest" with respect to the economic activity in question, because coordination between such entities does not represent "a sudden joining of two independent sources of economic power previously pursuing separate interests." 467 U.S. at 770-71. Respondents do not meaningfully dispute that Shell and Texaco, once they had agreed to form the joint ventures, had a complete unity of interest with respect to the pricing of Shell- and Texaco-branded gasoline in the United States. Indeed, Respondents expressly admit that it was Shell's and Texaco's "joint selling" of branded gasoline through the ventures that "eliminated important price competition between them." Brief for Respondents 21. Under *Copperweld*, therefore, Section 1 does not apply to decisions with respect to the pricing of such gasoline.[1] This is true regardless of whether a

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[1] Respondents assert that Shell and Texaco did not raise this argument in the court of appeals. Brief for Respondents 22 n.19. In fact, Shell and Texaco argued in their brief to the Ninth Circuit

plaintiff characterizes those decisions as having been made by the joint venture's owners rather than by the management of the venture that the owners oversee. *See Maricopa*, 457 U.S. at 356-57 ("a price-fixing agreement among the [owners] would be perfectly proper").

Indeed, even under the Ninth Circuit's flawed reasoning, Respondents' brief makes the inapplicability of Section 1 "plain beyond peradventure." *Cf. Citizen Publ'g*, 394 U.S. at 135. The Ninth Circuit suggested that there was a disputed issue of fact whether Shell and Texaco reached a decision that the joint ventures would charge the same price for the two brands of gasoline *before* the joint ventures were actually formed. Pet. App. 19a & n.11. Only because it assumed that factual issue about timing existed, the Ninth Circuit concluded that it must assume, for purposes of summary judgment, that the decision "was not [one] made by a single economic entity [but] a decision made by competitors." *Id.* at 20a & n.11. The United States likewise cites this reasoning by the Ninth Circuit in its suggestion that this Court not reach the question whether Section 1 applies at all to the conduct alleged in this case. Brief for the United States as Amicus Curiae Supporting Petitioners 11-12 n.6.

Respondents have now conceded, however, that the decision to charge the same price for Shell- and Texaco-branded gasoline was reached *after* the formation of the joint ventures. Brief for Respondents 1 ("Eight months after

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that "Section 1 of the Sherman Act, which regulates only joint conduct, does not even apply to pricing and other marketing decisions that an economically integrated joint venture makes post-formation. The courts view these as unilateral decisions of an independent company, not as the parent corporations' joint conduct." Appellees' Brief, filed Jan. 30, 2003, at 18. The Ninth Circuit likewise specifically referenced the argument. Pet. App. 17a (noting "defendants' argument . . . that joint ventures such as Equilon and Motiva are incapable of violating the Sherman Act").

forming the ventures, Shell and Texaco agreed with each other to take pricing discretion away from the ventures and directed them to charge the same dealer tankwagon prices for the Shell and Texaco brands of gasoline."); *id.* at 3 ("At that time [September 1998, following formation of the ventures], Shell and Texaco agreed to require Equilon and Motiva to set the same price for the Shell and Texaco brands."); *id.* at 8 ("At that point [September 1998], Shell and Texaco agreed to change the pricing.").[2] The United States agrees that, in this circumstance, under *Copperweld* Section 1 does not apply at all:

> Per se treatment would also be inappropriate even if . . . petitioners' agreement to unify the pricing of the two brands occurred *after* Equilon became operational. At that point, petitioners were not independent participants in the downstream markets and therefore were incapable of forming a horizontal agreement within the contemplation of the antitrust laws—i.e., "an agreement among competitors on the way in which they will compete with one another," *NCAA v. Board of Regents*, 468 U.S. 85, 99 (1984)—with respect to operations in those markets. . . . This Court's decision in *Copperweld*, which makes clear that the independent conduct of a unitary economic actor cannot give rise to Section 1 liability, would preclude any application of Section 1 in that context. See *Copperweld*, 467 U.S. at 771.

Brief for the United States as Amicus Curiae Supporting Petitioners 18-19 (emphasis in original).

Respondents argue that there is no authority for applying

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[2] Respondents' inconsistent suggestion that the Brand Management Protocols show a pre-formation agreement on pricing is discussed below. *See infra* at 17-18.

Copperweld to a joint venture and that doing so would be inconsistent with this Court's prior decisions. Both arguments are wrong. In *Maricopa*, this Court stated that a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the market." 457 U.S. at 356. A leading antitrust treatise similarly reasons that, "[o]nce a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy." VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478c, at 325 (2d ed. 2003).

That is precisely the situation here. In *Copperweld*, this Court counseled that the determination whether to treat actions of related entities as unilateral conduct under Section 1 should be based upon "the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny," 476 U.S. at 776, and that logic leads directly to the conclusion that Section 1 should not apply here.

None of the prior decisions of this Court relied upon by Respondents involved a situation such as the one present here—where, as a result of the formation of a procompetitive joint venture, there is no further relevant competition either between the joint venturers or between the joint venture and one or both of the venturers; and where the challenged restraint applies only to the business of the joint venture, not to any non-venture business of the venturers. As a result, in none of those cases was there a comparable "complete unity of interest" among the parties with respect to the challenged conduct.[3] *See Maricopa*, 457 U.S. at 356 (finding that a

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[3] Amicus American Antitrust Institute ("AAI") agrees that "a joint venture should be treated as a single firm for purposes of Section 1

purported joint venture among physicians was per se illegal because the venture consisted *solely* of the competing physicians' agreement on maximum prices to be charged for particular procedures); *National Collegiate Athletic Assn. v Board of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984) ("[t]he NCAA is an association of schools which compete against each other to attract television revenues"); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 456 (1986) (dentists were in "competition for patients"); *Citizen Publ'g*, 394 U.S. at 133-35 (each of two competing newspapers continued to produce its own news and editorial content, and the district court found that the formation of the joint venture was itself anticompetitive); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 595-98 (1951) (rejecting "joint venture" characterization of horizontal agreements between an American corporation and two foreign corporations in which it owned 30 and 50 percent interests, where the agreements involved no integration of production or sharing of profits or losses); *United States v. Sealy, Inc.*, 388 U.S. 350, 351 (1967) (each member of the joint venture continued to market and sell products in the relevant market); *United States v. Topco Assocs.*, 405 U.S. 596, 598 (1972) (each member of cooperative association "operates independently" without "pooling of earnings, profits, capital, management or advertising resources"); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 11, 19 (1979) (individual composers and authors—the members of the joint ventures—remained in direct competition with ASCAP and BMI); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940) (where no joint venture was even claimed to exist). Moreover, contrary to Respondents' suggestion, Brief for Respondents 28, the courts are quite capable of determining

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. . . when there is a complete unity of economic interest among those controlling the venture – *i.e.*, their sole economic interest is in maximizing the competitive ability and profitability of the venture-as-a-whole." Brief for AAI 5.

when the parties to a purported joint venture have a complete unity of interest and when they do not, just as, in applying other doctrines under the antitrust law, the courts regularly determine whether a restraint is "ancillary" to a joint venture and whether it "unreasonably" restrains trade.

Respondents argue that the formation of the joint ventures did not "end all competition between Shell and Texaco and eliminate them as independent centers of decisionmaking." Brief for Respondents 25. While it is true that Shell and Texaco continued to compete in *other* markets, even Respondents concede that, as the District Court found and the Ninth Circuit agreed, the formation of the joint ventures eliminated competition between Shell and Texaco in the *relevant* market. *See* Pet. App. 41a ("The creation of the alliance ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline."); *see also* Brief for Respondents 6 ("Where [Shell and Texaco] agreed not to compete with The Alliance was the domestic sale of gasoline and related products."); *id.* at 25 ("What they eliminated was competition in the sale of domestic gasoline while The Alliance lasted.").[4]

It is irrelevant that the joint ventures could be unwound, and that competition between Shell and Texaco might therefore have resumed. The challenged decision to price the two brands of gasoline the same applied only to sales by the

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[4] Indeed, in the district court, Respondents stipulated to this undisputed fact. J.A. 76 (¶ 42) ("The formation of Equilon ended competition between Shell and Texaco in the Western United States with respect to the downstream refining and marketing of gasoline."); *id.* at 77 (¶ 45) ("The formation of Motiva ended competition between Shell and Texaco in the Eastern United States with respect to the downstream refining and marketing of gasoline.")

joint venture.[5] If the ventures were "unwound," and the two brands of gasoline became competing products again, each company would be free to price its gasoline as it saw fit; if there were any continuing agreement between Shell and Texaco, that agreement would be subject to scrutiny under Section 1.

Similarly, the fact that Shell and Texaco continued to exist as separate entities and therefore as "independent centers of decisionmaking" is irrelevant. Affiliated corporations also are separate entities and independent centers of decisionmaking; nevertheless, when they have a complete unity of interest, agreements between them are treated as equivalent to the decisions of a single firm and, under *Copperweld*, are not subject to scrutiny under Section 1. Similarly, agreements between the co-owners of a legitimate joint venture, as to which those co-owners have a complete unity of interest, should not be subject to scrutiny under Section 1.

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[5] Respondents assert that Shell and Texaco "were able to offer no evidence of how this restraint served the interests of Equilon and Motiva" (Brief for Respondents 26), and argue that the pricing was not "compelled by *Robinson-Patman* compliance" (*id.* at 14 n.16). But the District Court found that "Defendants offer a plausible and justifiable reason why Equilon and Motiva would independently choose to set the price of Shell and Texaco branded gasoline the same: from the perspective of the ventures, the products are fungible." Pet. App. 52a. Further, Petitioners have never contended that the Robinson-Patman Act *compelled* the pricing policy; rather, the point is that the pricing policy allowed the ventures to avoid Robinson-Patman challenges by this very group of dealers on whose behalf Respondents filed this litigation. *See* Brief for Petitioner Shell Oil Co. 4. Indeed, the only reasonable inference is that the decision was based on the interest of the joint ventures, not any separate interests of Shell and Texaco, because, before the joint ventures existed, Shell and Texaco had each separately decided that it was in its *individual* interest to price its brand at a different level than the other brand.

II. EVEN IF SECTION 1 APPLIES, THE PER SE RULE DOES NOT.

As noted, the District Court found, and the Ninth Circuit agreed, that the creation of the joint ventures "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." Pet. App. 4a. Respondents do not dispute this finding, except to suggest that competition between Shell and Texaco could have *resumed* at some point if the joint ventures were unwound. That, of course, would be true with respect to *any* joint venture; indeed, it would be true of even a merger, following which the merged entity could be split apart, resulting in competition similar to that which existed before the merger. That does not change the simple fact that, at all times when the decision to charge the same prices for Shell- and Texaco-branded gasoline was effective, those products were not in competition with each other. As a result, *that decision did not restrain competition at all*; far less was the decision one that would have "predictable and pernicious anti-competitive effects" such that it could be per se illegal.

Rather than addressing the economic and common sense logic of this proposition, Respondents assert repeatedly that this Court's decision in *Citizen Publ'g* "is directly on point and controlling." *E.g.*, Brief for Respondents 20. Respondents are wrong for two reasons. First, *Citizen Publ'g* is readily distinguishable. There, the joint venture partners did not fully integrate their operations in the relevant market; instead, they maintained their separate production of news and editorial content and therefore remained in competition with each other. In addition, quite unlike the situation here—where the FTC reviewed the formation of Equilon and Motiva and determined that those joint ventures were not anticompetitive—in *Citizen Publ'g* the district court found that the joint newspaper operating agreement was anticompetitive and violated both Section 2 of the Sherman Act and Section 7 of the Clayton Act. 394 U.S. at 135.

Second, to the extent that *Citizen Publ'g* might nevertheless be read broadly, as Respondents urge (Brief for Respondents 19), for the proposition that pricing or other decisions that are related only to the products of an otherwise procompetitive joint venture may be condemned as per se illegal, the opinion is inconsistent with *Broadcast Music*, *NCAA*, and other subsequent decisions of this Court that have repudiated the initial suspicion of joint ventures that reached its apex with this Court's 1972 decision in *United States v. Topco Associates*, 405 U.S. 596 (1972), just three years after *Citizen Publ'g* was decided. *See Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (noting that, notwithstanding *Topco*, "it is [now] commonly understood . . . that per se condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224-29 (D.C. Cir. 1986) (noting that *Topco*'s per se condemnation of all horizontal restraints, even if they are ancillary to a partnership or joint venture, was overruled by this Court's decisions in *Broadcast Music, National Collegiate Athletic Assn.* and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985)).[6] Notably, although Shell made precisely this point about *Citizen Publ'g, see* Brief for Petitioner Shell Oil Co. 24 n.11, Respondents do not respond to it in any manner.[7]

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[6] *See also* Brief for AAI 14 ("[*Topco*] may not reflect this Court's approach after [*Broadcast Music*].").

[7] Respondents assert that this Court's decisions in *Timken* and *Maricopa* "involved joint venture price fixing." Brief for Respondents 41. In fact, in both of those cases, the Court determined that there was no real integration of productive assets sufficient to constitute a true joint venture; it was only for that reason that the Court found the challenged restraints to be per se illegal. *Timken*, 341 U.S. at 597-98; *Maricopa*, 457 U.S. at 356.

Respondents' reliance on Professor Areeda's example regarding a joint selling arrangement between Ford and General Motors is similarly misplaced. *See* Brief for Respondents 20-21. As the quotation from Professor Areeda's treatise makes clear, the hypothetical arrangement is one in which Ford and General Motors would continue to compete in the sale of automobiles and would not share in either the risks or rewards of such sales; instead, they would simply eliminate *one* form of competition between their respective, separately owned products—price competition—by selling through a common distribution agent. Here, by contrast, Shell and Texaco merged all of their domestic production and marketing operations, thereby both "pool[ing] their capital and shar[ing] the risks of loss as well as the opportunities for profit," *see Maricopa*, 457 U.S. at 356, and ending all competition between Shell- and Texaco-branded gasoline, without regard to any agreement with respect to the pricing of those products.[8] Moreover, Professor Areeda's point is that the *formation* of the Ford-General Motors joint selling arrangement would itself be an unreasonable restraint; nowhere does he suggest that, if it were otherwise (and Respondents have waived any rule of reason challenge here), joint pricing of the two companies' products could be condemned as per se (or otherwise) illegal under Section 1. *See* Areeda & Hovencamp, *supra*, ¶ 1475, at 304 ("[O]nce antitrust law deems the creation of an organization to be lawful, it would be inconsistent to prevent it from functioning by characterizing its normal operations as per se or otherwise unlawful conspiracies.").

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[8] Professor Areeda acknowledges that even a joint selling arrangement between two automakers with significant market shares like Ford and General Motors would *not* be per se illegal. Brief for Respondents 21 (*quoting* P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981) ("not unlawful *per se*").

Respondents assert that "[t]he restraint . . . was a direct restraint on price" and therefore per se illegal. Brief for Respondents 33. Respondents' suggestion that every "direct restraint on price" is per se illegal "price fixing" is precisely the sort of "overly simplistic and overbroad" literalness that this Court has rejected. *Broadcast Music*, 441 U.S. at 9. Every time the owners of a business set a price for their products, there is a "direct restraint on price," just as, every time two parties enter into a contract, there is a "restraint of trade." This Court long ago held that not every literal "restraint of trade " is unlawful under Section 1, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); and the Court has expressly stated that, "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act." *Broadcast Music*, 441 U.S. at 9. That principle, not *Citizen Publ'g*, is directly on point and controlling here.

Throughout their brief, Respondents focus exclusively on the decision that the joint ventures would charge the same price, in the same geographic area, for the same grade of Shell- and Texaco-branded gasoline. Nowhere do Respondents suggest that the decision by Shell and Texaco to unify the pricing *function* for the two brands—that is, to put the price setting under the control of each venture's management, supervised by its owners—was illegal.[9] Nor could they reasonably do so, given this Court's clear statement in *Broadcast Music* that two partners may set the prices of their goods *without* violating the Sherman Act. Yet Respondents simply ignore altogether Shell's explanation that the actual prices set for the brands—whether those prices be the same or 2 cents different, or the same on Monday and 2

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[9] The uncontroverted evidence supports the obvious point that the ventures could not have operated efficiently without such unification of the pricing function for the jointly owned products that the ventures were producing. J.A. 130-31 (¶¶ 61-62).

cents different on Tuesday—is totally irrelevant to the Section 1 analysis. *See* Brief for Petitioner Shell Oil Co. 26-27. If it were illegal price-fixing for Shell and Texaco jointly to set the *same* price for the two brands, it would be equally illegal price-fixing for them jointly to set *different* prices for the brands—a totally irrational result squarely at odds with *Broadcast Music*.

III. THE ANCILLARY RESTRAINTS DOCTRINE IS IRRELEVANT HERE.

Both Petitioners and the United States demonstrated in their briefs that the ancillary restraints doctrine, which was applied by the Ninth Circuit, has no relevance here because the challenged restraint relates exclusively to the products of the joint ventures, not to any business activities of Shell or Texaco outside those joint ventures. *See* Brief for Petitioner Shell Oil Co. 27-33; Brief for the United States as Amicus Curiae Supporting Petitioners 21-28. Respondents' only response, other than quotation from an article to the effect that the Ninth Circuit correctly applied the ancillary restraints doctrine, Brief for Respondents 40-41, is to assert that *Citizen Publ'g*, *Broadcast Music*, and *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003), "involve restrictions on pricing the venture's own products." Brief for Respondents 47-48. Neither *Citizen Publ'g* nor *Broadcast Music* applied the ancillary restraints doctrine; and, of course, *Broadcast Music* itself compels the conclusion that the restraints at issue here are *not* per se illegal. In *Freeman*, the Ninth Circuit emphasized that the joint venture partners remained competitors outside their joint venture and that the challenged agreements were per se illegal because they restrained that competition among them. 322 F.3d at 1149-50. It is, therefore, just another example of the principle that the ancillary restraints doctrine applies only to restraints on competitive activities outside the joint venture.

IV. "QUICK LOOK" ANALYSIS DOES NOT APPLY HERE.

As Respondents note, this Court has stated that a restraint may be held to violate Section 1 under an abbreviated, or "quick look," rule of reason analysis where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Such abbreviated analysis has no application here, however, because, for the reasons explained in Shell's opening brief and above, the challenged restraint—a decision about the pricing of two products of an integrated joint venture—had *no effect* on competition, far less an obvious anticompetitive effect. No justification whatever for the restraint was therefore required. If one were, it would suffice that the joint venture itself was legitimate and procompetitive and that pricing of a production and marketing joint venture's products is essential to the operation of the venture. As discussed above, it is irrelevant whether the prices set are the same, different or sometimes the same and sometimes different.

Respondents mistakenly rely on *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), in support of application of "quick look" analysis here. In *Polygram*, the D.C. Circuit expressly relied on the facts that the parties to the joint venture had imposed price and advertising restraints on "products that were not part of the joint undertaking" and that the venturers had continued to sell independently and in competition with their joint venture and each other. *Id.* at 38. The partners were not simply setting the prices of the joint venture's goods—which *Broadcast Music* holds is not illegal price-fixing—but instead restricting the prices of goods sold in competition with the joint venture.[10] No remotely similar

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[10] By focusing on the restriction of products *outside* the joint venture, *Polygram* also illustrates the crucial difference between a

restraint is alleged here.

V. RESPONDENTS HAVE DISTORTED THE FACTUAL RECORD.

Respondents distort the factual record in numerous respects. The distortions are immaterial, because none of them, even if correct, would change the fundamental fact that, once the ventures were formed, Shell- and Texaco-branded gasoline did not compete. But Shell responds to them briefly here lest these factual distortions obfuscate the issues.

First, Respondents assert that the pricing decisions caused price increases. There is absolutely no evidence, however, that any increase in the price of refined gasoline was caused by anything other than market forces—that is, supply and demand.[11] For example, there is no evidence that the prices of Shell- or Texaco-branded gasoline increased *relative to the prices of any other brands of gasoline*, such as Chevron, BP, ARCO, Amoco, Unocal, Exxon or Mobil.[12] Moreover, there

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situation in which the ancillary restraints doctrine applies and one, such as here, in which it does not.

[11] Contrary to Respondents' assertion, there is also no evidence that the price of the Texaco brand "[rose] to the level of the Shell brand." Brief for Respondents 11. The evidence is merely that, in those geographic areas where Equilon or Motiva sold both brands, the prices of the same grades of the same brands were the same. Indeed, Respondents stipulated below to the undisputed fact that "[p]rices in each trade area are set based on conditions in that particular trade area." J.A. 79 (¶ 63).

[12] AAI asserts that "Equilon would not have been able to raise the price of Texaco-brand gasoline without losing money to other rivals unless they were engaged in price coordination." Brief for AAI 26. There is, however, no evidence that Equilon raised the price of Texaco-branded gasoline *relative* to the prices of other brands, the only relevant measure. If the price of all brands increased by $0.20, there would be no reason for Texaco to lose market share or money to its rivals.

is no allegation or evidence of collusion or coordination between the joint ventures (or Shell or Texaco) and any other company in the United States gasoline market. Respondents' and their *amici*'s unsupported innuendo about "unexplained price hikes" (Brief for AAI 7) cannot substitute for evidence.

Second, Respondents assert that refining and marketing was previously profitable for Shell and Texaco and that the joint ventures were designed to avoid passing cost savings on to consumers – which cost savings, Respondents suggest, could have been achieved without forming the ventures. Brief for Respondents 5. Even if this were true, it would be relevant only to a rule of reason challenge to the formation of the joint venture. In any event, Respondents' citations for these points provide no support for them, and all of the evidence is to the contrary. Respondents' own evidence clearly shows that pre-venture refining and marketing profits were "insufficient" and "extremely poor." Appellants' Ninth Circuit Excerpts of Record 264, 279. Respondents' own evidence shows that the ventures would make possibly $800 million in cost savings that would not be possible without them, such as reducing duplication or redundancies. *E.g.*, *id.* at 605 ("Q. Okay. And the duplication was a result of the formation of the alliance, right? A. Yeah. Yeah."); *see also* Brief for Respondents 11 ("anticipated cost savings *from their combination*, estimated at $800 million per year" included elimination of redundancies between companies and avoidance of capital expenditures that would have been required but for ventures' formation) (emphasis added). The Ninth Circuit likewise found that "[t]here is a voluminous record documenting the economic justification for creating the joint ventures." Pet. App. 3a. Finally, Respondents' own evidence shows that all cost savings realized by the ventures would ultimately be passed on to consumers. Appellants' Ninth Circuit Excerpts of Record 300.[13]

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[13] Respondents misleadingly questioned one deponent about whether he had directed or been specifically advised that "synergies

Third, Respondents assert that "Shell and Texaco . . . continued to control The Alliance's marketing of products bearing their brands" through the Brand Management Protocols. Brief for Respondents 32; *see also id.* at 2. Again, even if true, this would not change the fact that the brands did not compete once the joint ventures were formed—regardless of who controlled their marketing. But the Brand Management Protocols did not reserve control over anything about gasoline marketing to Shell or Texaco; they were administered solely by the relevant venture, operating through its management as overseen by a subcommittee of the venture's governing board (which was in turn made up of members appointed by Shell and Texaco, as the venture's owners). Contrary to Respondents' unsupported suggestion, there is no evidence that Shell or Texaco could have unilaterally "directed" (Brief for Respondents 32) how gasoline that a venture sold under its brand name would be marketed – let alone evidence that Shell or Texaco actually did so.

The Brand Management Protocols simply provide that, because the Shell and Texaco brand names were used by Shell and Texaco respectively outside of the ventures, neither venture will use either brand name in a way that would degrade or favor "the value, reputation, prestige and goodwill associated with the Texaco Symbols" over the "Shell Symbols" – or vice versa. Appellants' Ninth Circuit Excerpts of Record 167 & ff. *See also id.* at 443 (intent of Brand Management Protocols was to protect "brand images"). The Brand Management Protocols do not discuss price and there is no evidence that the pricing policy was "a direct

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or costs savings" were being passed on to consumers, but the deponent himself explained that "the reason I'm hesitating is that people don't talk about prices changes in terms of synergies. What they talk about is what's the marketplace -." Appellants' Ninth Circuit Excerpts of Record 650-52.

outgrowth" of them. Brief for Respondents 6 n.10. Respondents themselves trumpet the undisputed evidence that there was no pre-formation discussion whatsoever of pricing. Brief for Respondents 6 n.10, 9-10 & n.14; *see also* J.A. 115 (¶ 25) ("The parties did not discuss what price the joint ventures would charge for gasoline upon or after formation.").[14] In any event, regardless of who controlled the marketing of either product (Shell, Texaco, the joint venture's management, or someone else), both Shell and Texaco stood to profit or lose based exclusively on the overall performance of the two products, so that the products were not in competition with each other.

Fourth, Respondents assert that there were "numerous exceptions permitting competitive activities outside The Alliance by Shell and Texaco." Brief for Respondents 32. Again, none of these Shell or Texaco activities outside the joint ventures changes the crucial fact that, after formation of the ventures, Shell and Texaco did not compete in the domestic wholesale marketing of gasoline. *See, e.g.*, Appellants' Ninth Circuit Excerpts of Record 402 (no exceptions to non-compete for domestic gasoline marketing); *see also* Appellees' Ninth Circuit Supplemental Excerpts of Record 107 (Respondents' expert characterized exclusions

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[14] Respondents distort the testimony to the effect that the joint venturers carefully and properly avoided any pre-formation discussion of pricing to insinuate an "inten[tion] to fix prices" of which there is no evidence and that did not exist (*e.g.*, Brief for Respondents 9 & n.14). Likewise, Respondents' suggestion that documents were "destroyed" and would have shown something sinister (Brief for Respondents 10) is wholly unsupported. As the district court found, "Plaintiffs have no evidence that defendants concealed documents." Pet. App. 46a. Rather, as would be expected and the antitrust laws encourage, the parties entered into confidentiality agreements and took other precautions to insulate the work of the negotiating teams from Shell's and Texaco's ongoing operations. J.A. 114-15 (¶¶ 22-25) & ff.

from ventures as "de minimus"). The fact that the venture owners could compete outside the scope of the ventures shows that the agreements between Shell and Texaco were appropriately drawn narrowly to encompass only the activities of the joint ventures themselves.

Fifth, Respondents assert, without citation to anything in the record, that, "when the Alliance ended . . . Shell and Texaco resumed their 'competition' charging the same prices for their branded gasolines." Brief for Respondents 32. Nothing in the record supports this assertion; indeed, there could be nothing in the record, because the joint ventures ended after the summary judgment motions had been submitted. In any event, any post-venture joint conduct of Shell and Texaco would, in a case in which the issue was properly raised, be subject to antitrust scrutiny. The issue in *this* case relates to the pricing of Shell- and Texaco-branded gasoline manufactured, owned and sold by Equilon during the period when Shell and Texaco did not compete in the relevant market.

Finally, Respondents assert, again without citation, that "having identical prices for Shell and Texaco products inside the Alliance facilitated price uniformity for products outside The Alliance, such as aviation fuel . . . ." Brief for Respondents 32-33. Respondents' amici repeat the assertion, citing only the unsupported statement in Respondents' brief. Brief for the Retail Industry Leaders Ass'n 8, 16-17. Even if true, this assertion would be relevant at most to a rule of reason evaluation of the actual effects of the pricing decision. Again, however, there is absolutely no evidence that supports either part of the assertion—either that prices for other products were uniform or that the pricing of gasoline by the joint ventures had, or might even theoretically have had, any effect on those other prices.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TEXACO INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER TEXACO INC.

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TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER TEXACO INC. 1

I. RESPONDENTS ERR IN SUGGESTING THAT THE PRICING OF JOINT VENTURE OUTPUT BY THE VENTURE OR ITS OWNERS IS *PER SE* ILLEGAL. 2

A. The *Per Se* Rule Does Not Apply To Pricing Of A Jointly Owned Product As To Which Competition Has Validly Been Ended. 2

B. Respondents Err in Suggesting That "Ancillary Restraint" Jurisprudence Requires Joint Venturers To Prove The "Necessity" Of Pricing Decisions About Their Jointly Owned Products. 6

II. PRICING OF A JOINT VENTURE'S OWN OUTPUT BY THE VENTURE OR ITS OWNERS IN A MARKET IN WHICH THE OWNERS DO NOT COMPETE IS NOT CONCERTED ACTION SUBJECT TO SECTION 1 9

A. This Court Has Not Applied Section 1 To A Joint Venture's Operation In A Market In Which Its Owners Do Not Compete. 10

B. Applying Section 1 To A Venture's Ongoing Operational Decisions Would Frustrate, Not Further, Sound Antitrust Enforcement. 11

TABLE OF CONTENTS (cont'd)

Page

III. NEITHER THE COMPETITION BETWEEN SHELL AND TEXACO IN OTHER MARKETS NOR THE POTENTIAL UNWINDING OF THE VENTURE, NOR THE NON-COMPETE AGREEMENTS, JUSTIFY APPLYING EITHER SECTION 1 OR THE *PER SE* RULE TO THE PRICING OF EQUILON'S PRODUCTS. 13

IV. THE ALTERNATIVE "QUICK LOOK" ARGUMENTS OF RESPONDENTS AND THEIR AMICI ARE MERITLESS. 17

A. Equilon's Operation Was Not Obviously Anticompetitive. 17

B. Respondents Have Not Shown Any Actual Anticompetitive Effects 20

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Maricopa County Med. Soc'y,
457 U.S. 332 (1982).....4, 10

Broadcast Music, Inc. v. CBS, Inc.,
441 U.S. 1 (1979).....passim

Business Elecs. Corp. v. Sharp Elecs. Corp.,
485 U.S. 717 (1988).....17

Cal. Dental Ass'n v. FTC,
526 U.S. 756 (1999).....17, 20

Citizen Publishing Co. v. United States,
394 U.S. 131 (1969).....2, 3

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984).....11, 12, 15, 16

FTC v. Ind. Fed'n of Dentists,
476 U.S. 447 (1986).....10

Knowles v. Iowa,
525 U.S. 113 (1998).....10

Nat'l Soc'y of Prof'l Eng'rs v. United States,
435 U.S. 679 (1978).....10

NCAA v. Board of Regents,
468 U.S. 85 (1984).....3, 10

Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.,
472 U.S. 284 (1985).....10

Polk Bros., Inc. v. Forest City Enters.,
776 F.2d 185 (7th Cir. 1985).....9

Rothery Storage & Van Co. v. Atlas Van Lines,
792 F.2d 210 (D.C. Cir. 1986).....6

TABLE OF AUTHORITIES (cont'd)

Page

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 4, 10

Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) 12

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 4

Statutes

15 U.S.C. § 1 ..... passim

15 U.S.C. § 18 12

Rules

Supreme Court Rule 15.2 10

Other Authorities

FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (Dec. 30, 1997) 18

U.S. General Accounting Office, *Motor Fuels: California Gasoline Price Behavior* (April 2000) 20

VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) 12, 13, 16

W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful*, 19 Antitrust 52 (Spring 2005) 16

XI Herbert Hovenkamp, *Antitrust Law* (2d ed. 1998) 20

REPLY BRIEF FOR PETITIONER TEXACO INC.

In our opening brief (at 11-26), petitioner Texaco demonstrated that the Ninth Circuit erred in treating the pricing of Equilon's gasoline as concerted action subject to Section 1 of the Sherman Act. When a joint venture or its owners set the price of the venture's own output in a market in which the owners no longer compete, that conduct is necessarily single firm conduct, and cannot properly be treated as an ongoing daily conspiracy. Pricing decisions for such jointly produced output do not deprive the economy of independent decisionmakers or increase any market power. Once the venture itself is validly formed (and the Ninth Circuit here did not question the validity of the formation of this joint venture, which indisputably achieved substantial real efficiencies and was extensively reviewed and found valid by federal and state regulators), the venture is entitled to operate its business as would any other entity, without its every production or marketing decision being second-guessed under the antitrust laws as supposedly unreasonable or unnecessary. This Court's decisions recognize as much, and respected commentators agree.

As we further demonstrated in our opening brief (at 26-37), even if Section 1 review is available in these circumstances, *per se* condemnation of the joint venture's operation is plainly improper. *Per se* treatment is reserved for those few agreements that experience has taught are plainly anticompetitive and economically unwarranted because they directly eliminate otherwise existing competition without offsetting economic benefit. Here, Equilon's pricing decisions did not eliminate competition, because they were made with respect to Equilon's own gasoline as to which the venture's valid formation had already ended competition. Subjecting such decisions to *per se* illegality would effectively prohibit the formation of production and marketing ventures such as this one and deprive the economy of beneficial collaborative activities that this Court and others have recognized produce real consumer benefits.

None of the arguments that respondents or their amici advance in their opposing briefs casts any doubt on these points of law. Indeed, recognizing the indefensibility of the Ninth Circuit's ruling, respondents and their amici advance several arguments that abandon the Ninth Circuit's reasoning and ask the Court to affirm on other grounds. The new arguments, however, are no more valid than the old ones.

I. RESPONDENTS ERR IN SUGGESTING THAT THE PRICING OF JOINT VENTURE OUTPUT BY THE VENTURE OR ITS OWNERS IS *PER SE* ILLEGAL.

A. The *Per Se* Rule Does Not Apply To Pricing Of A Jointly Owned Product As To Which Competition Has Validly Been Ended.

Respondents begin their argument in favor of application of the *per se* rule by suggesting (Resp. Br. 18-20) that this Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), forecloses any other analysis of the matter. *Citizen Publishing* obviously does not do so.

In *Citizen Publishing*, the newspapers' venture had neither fully combined the operations of its owners nor eliminated competition between them in the relevant market. Rather, the newspapers had retained their separate news and editorial departments and, in setting their advertising and subscription rates, the newspapers were not setting the price for a jointly produced product (but were agreeing on prices for their separate products as to which they remained in competition). In contrast, here, Texaco and Shell fully combined their respective refining and marketing assets in the relevant markets and themselves exited from competition in these markets; in setting the price of Equilon's production, they were thus no longer acting as separate competitors but rather as joint owners of a single entity. Moreover, unlike this case (in which the Ninth Circuit did not question the legitimacy of the integration of Shell's and Texaco's operations), *Citizen Publishing* ruled that the newspapers could not have validly

integrated their operations. 394 U.S. at 134-35. Thus, *Citizen Publishing* is not only not controlling, it has very little application here, since it dealt with the fundamentally distinct situation in which two competitors have fixed the prices of products that they have not, and could not validly have, jointly produced.

There is also a historical, and resulting doctrinal, reason that *Citizen Publishing* is unhelpful to the analysis here. That decision was rendered in an era in which the Court took a very different approach to antitrust issues generally and to the analysis of joint ventures in particular. Of special significance, *Citizen Publishing* was decided before the Court's rulings in cases such as *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ("*BMI*"), and *NCAA v. Board of Regents*, 468 U.S. 85 (1984), where the Court adopted a much more nuanced approach to restraints associated with joint ventures. In *BMI*, for example, the venture had set the price for the venture's blanket license. But this Court rejected the *per se* rule as inappropriate, even though (unlike here) the venture participants remained competitors in the same market. That result applies *a fortiori* here, where the pricing decision did not fix the price of any products that remained in competition. Yet respondents would have the Court read *Citizen Publishing* without regard to either later cases such as *BMI* or the Court's evolving approach to joint ventures and related antitrust issues.

Respondents complain (Resp. Br. 19, 33) that this case involves a "price-fixing" agreement that "was secret" and that *per se* treatment is required because they challenge a "direct restraint on price." But this complaint rests on the very "overly simplistic" literalism that this Court rejected in *BMI*, 441 U.S. at 9. The question is not whether a price has been jointly set. The question is whether setting the price has restrained competition that would otherwise exist. Here, no such restraint existed because competition between the two companies had already been ended in this market by virtue of Equilon's formation and the complete, efficiency-

enhancing integration of Shell's and Texaco's gasoline businesses in the United States. Respondents do not, and cannot, cite any authority for applying the *per se* rule where the agreement at issue is between the owners of jointly produced products as to which competition has validly been ended. In such circumstances, the rationale for *per se* illegality—*i.e.*, that the restraint at issue is one that "always or almost always tend[s] to restrict competition and decrease output," *BMI*, 441 U.S. at 19-20—is inapplicable.

The linchpin of this Court's cases applying the *per se* rule against price-fixing agreements is the "absence of competition secured by the agreement." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927); *see id.* ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition."). Here, the decision by Equilon (or its owners) as to the price for Equilon's gasoline did not secure the absence of competition. It was simply the pricing of products that were already jointly owned and thus not in competition. There is no basis for subjecting them to Section 1 scrutiny at all, much less for condemning them as *per se* illegal.

Respondents thus also err in suggesting (Resp. Br. 33-44), that *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), and *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), support application here of the *per se* rule. In *Maricopa County*, the pricing decisions were held to be *per se* unlawful because the doctors in issue there had *not* validly ended relevant competition by forming a cooperative enterprise in which they "pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit." 457 U.S. at 356. Had they done so, as Shell and Texaco did here, the Court recognized that a decision among them setting the price for their joint product "would be perfectly proper." *Id.* at 357. And, like the doctors in *Maricopa County*, the corporations in *Timken* had not integrated their operations into a new venture, but had simply reached horizontal agreements regarding the prices of their separately produced

and competing products. Respondents thus do not and cannot gain support from either decision.

Respondents' reliance on *BMI* is similarly misplaced. The fact that the copyright holders there continued to sell individual licenses was relevant because, absent the availability of such individual licenses, the challenged blanket licenses would have been the exclusive means of purchasing virtually any copyrighted work. *See BMI*, 441 U.S. at 5 ("[a]lmost every domestic copyrighted composition is in the repertory" of the defendants). Equilon enjoyed no such control over domestic gasoline, but faced numerous, significant competitors. That was the reason, in combination with the efficiencies that Equilon's formation would create, that the FTC permitted Equilon to be formed to produce and market gasoline. And, once validly formed, Equilon and its owners were entitled to set a price for its products on the same basis that BMI and ASCAP were allowed to set the price for their joint products. Indeed, whereas rule of reason analysis was appropriate in *BMI*, because the copyright holders remained in competition in the market, here Section 1 scrutiny is not appropriate at all, because Shell and Texaco no longer compete in the relevant market.

Respondents emphasize (Resp. Br. 35-36) that the blanket licenses in *BMI* were a "new product" that individual copyright holders could not have produced on their own. But procompetitive, efficiency-creating ventures are not limited to those that create new products. As in this case, joint ventures can create efficiencies in producing and marketing existing products by eliminating redundancies, creating economies of scale, and sharing risk. *See* Tex. Br. 25 n.13. Even the Ninth Circuit recognized that "[t]here is a voluminous record documenting the economic justifications for creating the joint ventures" here. Pet. App. 4a. That being the case, no basis exists for Section 1 scrutiny of—much less for condemning as *per se* illegal—the operation of Equilon's validly formed business. As *BMI* itself stated, "[w]hen two partners set the price of their goods or services

they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." 441 U.S. at 9.

B. Respondents Err in Suggesting That "Ancillary Restraint" Jurisprudence Requires Joint Venturers To Prove The "Necessity" Of Pricing Decisions About Their Jointly Owned Products.

Finding no support for their argument in this Court's *per se* rule jurisprudence, respondents next erroneously seek refuge in the so-called "ancillary restraint" jurisprudence. Specifically, respondents argue (Resp. Br. 38-41) that, under "ancillary restraint" cases, *per se* treatment is proper unless defendants can prove that charging the same price for the Shell and Texaco brands was "necessary" to the venture's success. As demonstrated in our opening brief (at 32-37), however, that argument is fundamentally flawed.

Among other things, respondents proceed from the mistaken premise that setting a price for Equilon's gasoline is an "ancillary" restraint that must be separately justified. As the United States explains (U.S. Br. 22-28), "ancillary restraint" analysis only applies to agreements that themselves restrain competition outside of the joint venture, and that therefore must themselves be separately justified. *See Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 224 (D.C. Cir. 1986) (describing an ancillary restraint as "an agreement eliminating competition"). When the alleged agreement does not impose any additional limitation on competition that would exist absent that agreement, no basis exists for requiring separate justification. Rather, it is the agreement that eliminated competition in the first place that is subject to antitrust scrutiny and that must be justified. In this case, that agreement was Equilon's formation as both a production and a marketing venture. The decision as to how that venture's products would be priced is simply the operation of that venture; it is not an additional restraint that can be said to restrain competition in the market and to require scrutiny as an "ancillary restraint."

Contrary to respondents' assertion, this is exactly the approach followed in *BMI*. The Court there did not analyze the pricing of the blanket license as an ancillary restraint. The setting of a price for the license did not create any additional elimination of competition separate from the creation of the blanket license itself. The setting of price was simply the "necessary consequence" of creating the blanket license, 441 U.S. at 21—just as the necessary consequence of forming a venture to both produce and sell gasoline is that a price must be established for that gasoline.

There is an important difference between *BMI* and this case—but it is a difference that further defeats respondents' argument. In *BMI*, the venture members each continued to produce and own their own copyrighted works and "retain[ed] the rights individually to license" those works. 441 U.S. at 11. In contrast, here, Shell and Texaco entirely exited the relevant market and were no longer in competition with each other or with Equilon; and the challenged action—the joint setting of a unified price for the joint venture's gasoline production—concerns the operations of the joint venture itself, not "ancillary" actions of the joint venture partners. Thus, whereas rule of reason analysis remained to be applied to the restraint at issue in *BMI*, here no Section 1 scrutiny is appropriate at all, much less *per se* analysis.

Applying ancillary restraint analysis to a venture's operation of its own business would work a fundamental shift in antitrust jurisprudence. When two companies form a venture that integrates some aspect of their operations, the courts do not condemn that integration as *per se* illegal if the companies cannot show that the integration was "necessary" or that the companies could not function without it. Instead, the courts evaluate the integration under the rule of reason, with the burden on the plaintiff to initially prove that the integration will have anticompetitive effects. It is only if such anticompetitive effects are shown that the courts inquire into whether the benefits of the venture outweigh those effects and whether particular aspects of the venture are

necessary to achieving those benefits. Respondents' approach would fundamentally alter the established inquiry.

Respondents complain (Resp. Br. 12, 16) that "no efficiencies, cost savings, or competitive benefits" resulted from the alleged price fixing and that the venture "could have functioned . . . perfectly well" without it. But respondents cite no authority for the proposition that joint venturers must show that the particular manner in which the venture conducts its business is "necessary." As discussed in our opening brief (at 36), any such standard would wreak havoc on joint ventures, because it would be virtually impossible to show that charging one price is any more "necessary" than charging any other price—or that selecting one output level, or one particular supplier, is any more "necessary" than selecting a different one. Respondents have no answer for this point. Nor do they suggest any reason why Equilon's pricing would be any less subject to *per se* condemnation under their approach if Equilon had adopted a different pricing strategy. To the contrary, their argument that no cost savings resulted from charging the same price would apply equally to any pricing strategy that Equilon might have adopted. Rather, under respondents' approach, the only apparent means by which petitioners could have avoided *per se* condemnation would have been to remove the pricing function from Equilon and effectively unwind the entity as a marketing venture. If this approach were accepted, not only would Section 1 scrutiny be applied where none is justified, the governing rule of reason standard for evaluating a venture's formation would also effectively be supplanted with a *per se* rule of illegality for marketing of a joint venture's products.

Respondents quote the Ninth Circuit's suggestion that the result might be different if petitioners had merged their brands into "one collective brand." Resp. Br. 49 (quoting Pet. App. 27a). But this assertion only confirms the irrationality of respondents' position—and its lack of connection to any valid antitrust policy. If competition were

thwarted by selling gasoline under two brands at the same price, it would be equally thwarted by selling gasoline under a single brand at a single price. Either way, petitioners would be agreeing on the price of gasoline that was sold. Despite respondents' disclaimer, there is no logical stopping point for their argument. It would unavoidably preclude joint ventures from setting selling prices for their own products, and thus effectively ban beneficial, efficiency-enhancing collaborations that are vital to the economy. *See Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 188 (7th Cir. 1985) ("The war of all against all is not a good model for any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.").

II. PRICING OF A JOINT VENTURE'S OWN OUTPUT BY THE VENTURE OR ITS OWNERS IN A MARKET IN WHICH THE OWNERS DO NOT COMPETE IS NOT CONCERTED ACTION SUBJECT TO SECTION 1.

As part of their erroneous effort to apply the *per se* rule to the pricing of a joint venture's output by the venture or its owners, respondents urge (Resp. Br. 22-31) that joint ventures like Equilon are really not single entities and thus should not be treated as such for antitrust purposes. This argument is also flawed at every turn.[1]

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[1] Contrary to respondents' assertion, petitioners argued in the court below that Section 1 should not be applied here (*e.g.*, Appellees' Brief, filed January 30, 2003, at 18, 21; Petition for Rehearing, filed January 22, 2004, at 2, 14), and the court of appeals ruled on the issue (Pet. App. 19a-20a n.11). Indeed, the applicability of Section 1 is precisely the issue that divided the majority and the dissent below. *Compare* Pet. App. 6a & n.4, 19a n.11 (majority op.) (finding concerted action), *with id.* at 31a (Fernandez, J., dissenting) (concluding that Equilon should be viewed as "a separate entity"). Petitioners also made this argument in the

A. This Court Has Not Applied Section 1 To A Joint Venture's Operation In A Market In Which Its Owners Do Not Compete.

Respondents point out that this Court has a "long history of applying the antitrust laws to joint ventures." Resp. Br. 23. That is of course true, and the antitrust laws have been applied to this venture—*i.e.*, when the FTC and the states reviewed its formation and found it to be permissible. But the antitrust laws have not been applied to regulate the pricing decisions or other operational activities of joint ventures—at least not in the manner respondents urge here.

The Court's joint venture cases have involved either scrutiny of the venture's formation, *e.g.*, *Timken*, 341 U.S. 593, or scrutiny of a restraint on non-venture conduct or conduct in a market in which the venture owners remained in competition. *E.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985); *NCAA*, 468 U.S. 85; *Maricopa County*, 457 U.S. 332; *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978). None of these circumstances is at issue in this case.

All that is at issue here is an integrated joint venture's operation of its own business in a market in which the venture owners no longer compete. None of this Court's precedents has applied Section 1 in this context. Indeed, the Court concluded just the opposite in *Maricopa County*, where it observed that a joint venture consisting of companies that have "pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the

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petitions for certiorari (Texaco Pet. 10-13, 18-22; Shell Pet. 15-16), and respondents did not assert in their opposition that the argument had not been presented below. Any contention that petitioners' argument is not properly before this Court is thus erroneous and has been waived. *See, e.g.*, Sup. Ct. R. 15.2; *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998).

market," with the result that "a price-fixing agreement among the [partners] would be perfectly proper." 457 U.S. at 356-57.

Contrary to respondents' argument (Resp. Br. 22), this is not a matter of according joint ventures "special antitrust status." Rather, it is simply applying to joint ventures the same Section 1 standards that apply to all firms. Section 1 applies only to conduct that involves "a sudden joining of two independent sources of economic power previously pursuing separate interests"—a "merging[] of resources" that "increases the economic power moving in one particular direction." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769, 771 (1984). When two firms have already combined their businesses and no longer compete in the relevant market, a decision about the prices the new entity will charge for its products is not a "merging of resources" and has no effect on economic power. It is merely the operation of the new entity's validly formed business. While Section 1 applies to the formation of the joint venture, it does not apply to the ongoing operation of the entity once formed.

B. Applying Section 1 To A Venture's Ongoing Operational Decisions Would Frustrate, Not Further, Sound Antitrust Enforcement.

In response, respondents assert (Resp. Br. 29) that "sound public policy" supports applying Section 1 here. But they have no coherent response to the point that subjecting a joint venture's ongoing daily operations to separate antitrust scrutiny would be completely unworkable. While they assert (*id.* at 28) that identifying which joint venture activities should be treated as concerted action and which should not would be more difficult than just calling everything concerted action, the distinction in the Sherman Act between concerted action and single firm conduct is well-established and exists for an important reason: business decisions that do not restrain otherwise existing competition do not

threaten competition, which is best served by allowing businesses to operate without fear of their "every action [being subjected] to judicial scrutiny for reasonableness." *Copperweld*, 467 U.S. at 775. *See* VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1462, at 192 (2d ed. 2003) ("[S]ubjecting virtually every decision made within a single firm to Sherman Act § 1 scrutiny would not only overtax the limits of our antitrust enforcement institutions, it would also involve judges and commissioners with the daily business decisions of every firm.").

Contrary to respondents' argument (Resp. Br. 30), recognizing that Section 1 does not apply to a joint venture's conduct of its own business does not mean that antitrust enforcers must "anticipate every conceivable restraint in which the venture could engage post-formation." *Id.* If the venture participants later change the scope of their venture, or adopt new restrictions on their non-venture conduct, such decisions would be subject to Section 1 scrutiny on the same basis as the original formation decisions. But there is no need for separate Section 1 scrutiny of the ongoing operation of the business that the venture was formed to conduct—nor for antitrust regulators to try to predict the specific pricing strategy that the joint venture may adopt or the output decisions that it may make. The protection against any anticompetitive consequences flowing from such pricing or output decisions is not ongoing scrutiny of those individual decisions for "reasonableness." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.) ("antitrust courts normally avoid direct price administration"). Rather, the protection against any such anticompetitive consequences is the rigorous evaluation of market conditions in which the business will operate that is part of a traditional rule of reason assessment of the permissibility of the joint venture in the first place. Here, the FTC and the states performed just such a rigorous evaluation when, applying the standards of Section 1 of the Sherman Act and Section 7 of the Clayton Act, they examined the

markets in which Equilon would operate and concluded that (with certain divestitures) Equilon would lack the ability to engage in supracompetitive pricing. VII *Antitrust Law* ¶ 1464, at 214 ("legal permission for a particular merger under the rather stringent prophylactic standards of Clayton Act § 7 necessarily expresses the judgment that the merger presents an insufficient anticompetitive threat to warrant condemnation"); *see* U.S. Br. 17 (confirming that, in reviewing Equilon's formation, the "FTC applied the antitrust enforcement standards that the Justice Department and the FTC apply to mergers").

The lack of merit in respondents' position is perhaps best illustrated by their assertion that, if petitioners had wanted to avoid lawsuits like this one, "they could have merged, as they well knew." Resp. Br. 31. Respondents thus concede that it would have been perfectly lawful for a merged company to decide to charge the same price for Shell- and Texaco-branded gasoline. The competitive consequences of that situation, however, would be no different from what actually occurred here—except that a complete merger would have eliminated competition between Shell and Texaco to an even greater degree by extending to other markets beyond just domestic gasoline. The antitrust laws do not and should not prefer mergers to joint ventures; and they certainly should not be construed to provide unnecessary incentives for the elimination of competition where economic benefits do not warrant it.

III. NEITHER THE COMPETITION BETWEEN SHELL AND TEXACO IN OTHER MARKETS NOR THE POTENTIAL UNWINDING OF THE VENTURE, NOR THE NON-COMPETE AGREEMENTS, JUSTIFY APPLYING EITHER SECTION 1 OR THE *PER SE* RULE TO THE PRICING OF EQUILON'S PRODUCTS.

In arguing for the application of both Section 1 and the *per se* rule, respondents point out (Resp. Br. 24-27, 31-32)

that Shell and Texaco did not end competition between themselves in other markets, that the venture could be unwound, and that Shell and Texaco entered into non-compete agreements with respect to the market in which Equilon was to operate. From these facts, respondents assert (Resp. Br. 32) that the pricing of Equilon's own products might facilitate "collusion and pricing uniformity" regarding Shell's and Texaco's non-venture products or their own gasoline upon the venture's termination, or otherwise justify application of Section 1 and the *per se* rule to the pricing of Equilon's products. This argument is also unsound.

First, in advancing this argument, respondents abandon the Ninth Circuit's reasoning. The Ninth Circuit concluded that Section 1 applies here, not because of any competition between Shell and Texaco in other markets, but because Shell and Texaco supposedly "agreed in advance" of Equilon's actual formation on the pricing for the two brands. Pet. App. 19a n.11. For the reasons explained in our opening brief (at 23-24), that ruling was erroneous; and, by now focusing on arguments about other markets and products or on the non-compete agreements, respondents are revealing that they understand they cannot defend that ruling.

Second, respondents presented no evidence that pricing decisions about domestic gasoline had any relation to, or any potential to affect, pricing of such disparate products as marine lubricants, sulfur, heavy fuel oils, coke or any of the other products Shell and Texaco sold outside the venture. Nor is there any evidence suggesting that pricing during the venture had any effect on—or potential to affect—post-venture gasoline pricing. On these and other issues, respondents and their amici argue as though the case had been dismissed on the pleadings, rather than the district court having granted summary judgment after full discovery on all liability issues. The question at this stage is not what respondents might have proved; rather, the question is what they in fact proved by sufficient evidence to withstand summary judgment.

Third, even if there were evidence (or reason to believe) that pricing of the joint venture's products could affect pricing of non-venture products, that would not be a proper basis for applying Section 1 to the pricing of Equilon's products—and certainly not for condemning it as *per se* illegal. The alleged adverse effect on competition does not flow from any decision to charge any particular price; the supposed adverse effect would exist regardless of whether Equilon charged the same or differing prices for the two brands. Either way, Equilon or its owners would be establishing relative prices for the gasoline, which price would then (under respondents' theory) be a basis for "facilitating" similar pricing of other products. The issue, then, is not how Equilon priced its gasoline, but rather whether it was proper for Equilon (or its owners) to set any price at all for that gasoline—*i.e.*, whether Equilon could legitimately be formed as both a production *and* marketing venture. While that question may be subject to Section 1 scrutiny, the scrutiny is not of the propriety or "necessity" of any particular pricing decision (as respondents urge and the Ninth Circuit held). Nor would the question be evaluated under the *per se* rule. The inquiry would instead be a rule of reason inquiry into the propriety of Equilon's formation as a marketing venture, under which any anticompetitive effects must be proved (not conjectured) and carefully balanced against the procompetitive benefits created by the venture (which are unchallenged here). *Cf. Copperweld*, 467 U.S. at 768. That is precisely the inquiry that the FTC and four state attorneys general conducted at the time that Equilon was formed. Neither court below questioned the validity of Equilon's formation as a marketing venture, and respondents expressly abandoned below any challenge under the rule of reason, whether to the venture's formation or otherwise.

Fourth, respondents also apparently still assert (Resp. Br. 33) that setting the same price for the two brands restrained competition between the brands while the venture was in existence. But that is the very intra-enterprise conspiracy

theory that this Court rejected in *Copperweld*. The competition with which Section 1 is concerned is competition between "independent sources of economic power," *Copperweld*, 467 U.S. at 771, not competition between brands under the exclusive control of a single entity. *See* U.S. Br. 14. Once the decision to combine the two brands under common ownership is found permissible, no legitimate antitrust purpose is served by subjecting the daily pricing behavior of the combined entity to continual scrutiny. If respondents' theory of competition and antitrust law were accepted, validly merging companies that wish to continue to use their existing brand names could always be required to maintain competition between those brands. That is not the law, nor should it be. *See* W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful,* 19 Antitrust 52, 55 (Spring 2005) ("A decision by Equilon and Motiva to charge the same price for Shell and Texaco gasoline is no different than a decision by Hewlett-Packard to charge the same price for HP and Compaq brand computers.").

Fifth, the fact that Equilon could be terminated (and later was terminated as a joint venture when Texaco merged with Chevron) does not change this analysis. The expected duration of the venture is relevant in a rule of reason analysis of the venture's formation, since a venture scheduled to last only for a brief period might not be able to achieve real efficiencies that could outweigh any potential anticompetitive consequences. But if the venture is valid under the appropriate rule of reason analysis (both the FTC and the district court so found here, *see* U.S. Br. 14 n.8; Pet. App. 58a-59a, and respondents below abandoned any contrary claim), the fact that the venture may later be unwound does not justify any further Section 1 scrutiny—just as it would not justify further Section 1 scrutiny of the internal operation of a merged company (which can also be unwound). Once validly formed, joint ventures (and merged companies) must be free to conduct their validly formed businesses as would other entities. *See also* VII *Antitrust Law* ¶ 1475, at 304

("[O]nce antitrust law deems the creation of an organization to be lawful, it would be inconsistent to prevent it from functioning by characterizing its normal operations as *per se* or otherwise unlawful conspiracies.").

Finally, contrary to respondents' argument, there is no legal basis for suggesting (Resp. Br. 24) that the non-compete agreements are themselves *per se* illegal. Shell and Texaco did not merely agree to not compete with each other while remaining independent participants in the relevant market without any integration. Instead, their non-compete agreements accompanied their valid efficiency-enhancing integration of all of their domestic gasoline refining and marketing assets. In such circumstances, non-compete agreements are both normal and the classic example of an ancillary agreement that is not illegal *per se* but instead evaluated under the rule of reason. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 (1988) ("The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market."). Respondents disclaimed any such challenge when they abandoned any rule of reason claim below. *See* Pet. App. 7a ("plaintiffs disclaimed any reliance on the traditional 'rule of reason' test").

IV. THE ALTERNATIVE "QUICK LOOK" ARGUMENTS OF RESPONDENTS AND THEIR AMICI ARE MERITLESS.

Respondents and their amici alternatively assert that at least "quick look" analysis should be applied. Resp. Br. 41; AAI Br. 10-23. These arguments are similarly meritless.

A. Equilon's Operation Was Not Obviously Anticompetitive.

"Quick look" treatment requires that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). There must

be a "great likelihood of anticompetitive effects [that] can easily be ascertained." *Id.* Respondents do not and cannot come close to meeting that standard.

There is no reason to imagine here, much less any evidence, that the pricing of a joint venture's own product (whether at the same or different prices) will have any anticompetitive effect—let alone that there is a "great likelihood" of such an effect. The FTC reached just the opposite conclusion when, after an extensive investigation, it permitted the venture to be formed as a production and marketing venture conditioned on limited divestitures which "alleviate[d] the alleged competitive concerns arising from the Joint Venture." FTC, *Analysis to Aid Public Comment,* 62 Fed. Reg. 67,868, 67,869 (Dec. 30, 1997). Since there is no basis for suggesting that the federal government's designated antitrust enforcement agency for this transaction (along with the attorneys general of four states) lacks a "rudimentary understanding of economics," it is hard to imagine a less likely candidate for "quick look" treatment than this joint venture.

Respondents' attempted analogy to Professor Areeda's hypothetical joint selling arrangement between GM and Ford, Resp. Br. 20-22, only confirms this point. Professor Areeda's argument was that the formation of such a venture would be unlawful because it would merely be a vehicle for establishing the price for separately produced and owned goods, without achieving any meaningful efficiencies. The hypothesized venture did not involve any integration or sharing of risk. Here, by contrast, Equilon was a full integration of Shell's and Texaco's production and marketing operations that was reviewed at length by federal and state regulators and found proper. "Quick look" is inapplicable.

Quick look liability is also improper even if, as the American Antitrust Institute ("AAI") urges, respondents could be thought to be challenging the Brand Management

Protocol, rather than the specific prices that Equilon charged. The AAI asserts that the Brand Management Protocol, which merely established the conditions under which the Shell and Texaco brands were licensed to Equilon, imposed an "unduly restrictive structure" on Equilon that impaired Equilon's "ability to compete in the market" by preventing it from pursuing a profit-maximizing strategy. AAI Br. 4, 16. There is of course no evidence that the Brand Management Protocol had anything to do with the decision about how Equilon's products would be priced or that, if it did, Equilon's pricing strategy was not in fact profit maximizing. But, even if there were such evidence, it would still not support a claim that the Brand Management Protocol or Equilon's pricing was anticompetitive, let alone so obviously anticompetitive that it could be condemned on a quick look basis without full analysis.

Numerous companies pursue business strategies that may not always maximize their profits. That does not mean that a company's operation is anticompetitive or that the strategy violates the antitrust laws. Nor, in the case of a joint venture, does it mean that the venture is invalid as not being sufficiently "efficient" or "vigorous" (AAI Br. 6, 12) in its behavior. Unless the venture possesses market power (and the FTC and four state attorneys general concluded that, as formed, Equilon would not), any internal constraints on its operational decisions—whether "unduly restrictive" or otherwise not "profit-maximizing"—would at most harm only the venture, not competition. If respondents wished to argue otherwise, it was their burden to adduce evidence proving as much. They did not do so.

The AAI's unsupported speculation (AAI Br. 6, 17) that the Brand Management Protocol was adopted (and may have been applied) to protect the venture owners' interests outside the venture is similarly irrelevant. Even if that were true, there would be nothing obviously anticompetitive about venture owners acting to preserve the value of their assets outside the venture. To the contrary, it is just as likely that

doing so would have "a net procompetitive effect, or possibly no effect at all on competition." *Cal. Dental*, 526 U.S. at 771.

B. Respondents Have Not Shown Any Actual Anticompetitive Effects.

Finally, respondents err in suggesting (Resp. Br. 45) that "demonstrable anticompetitive market effects" exist here because gasoline prices rose in early 1999. They presented no evidence that the price increases had anything to do with Equilon or its pricing strategies. They assert only that crude oil prices were stable or dropping at that time. Even if that were true, however, gasoline prices are not merely the product of crude oil costs but are affected by numerous other variables, including consumer demand and refining and transportation constraints. Respondents have not attempted to control for these variables; and thus the inferences that they seek to draw are legally spurious ones. Indeed, federal investigators examining the 1999 West Coast price increases concluded that they were primarily the result of disruptions in supply caused by a refinery explosion in Northern California and subsequent outages in three other California refineries. *See* U.S. General Accounting Office, *Motor Fuels: California Gasoline Price Behavior*, at 12-13 (April 2000). In short, because there is no proof that the market-wide price increases were causally linked to the internal pricing decisions of a single actor in that market, the price increases to which respondents point are legally meaningless. *Cf.* XI H. Hovenkamp, *Antitrust Law* ¶ 1914, at 351 (2d ed. 1998) ("[I]n any case where proof of an output reduction substitutes for a showing of power, causation must be established. The mere fact that output declines after a restraint has been put in place does not mean that the restraint contributed in any way to the output reduction.").

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

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FOUAD N. DAGHER, ET AL.

SHELL OIL COMPANY, PETITIONER
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of Argument 7
Argument 10
An agreement between the owners of a legitimate joint venture respecting the pricing of the joint venture's products is not subject to per se condemnation 10
A. The court of appeals improperly extended per se analysis to an agreement that does not restrain competition 10
B. The court of appeals erred by invoking the ancillary restraints doctrine in this case 21
C. The court of appeals' result is inconsistent with the procompetitive purposes of the antitrust laws 28
Conclusion 30

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Cases:

Addamax Corp. v. *Open Software Found., Inc.*, 152 F.3d 48 (1st Cir. 1998) 23
Arizona v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) 13, 16, 19
Blackburn v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995) 25

Cases—Continued: Page

BMI v. *CBS, Inc.*, 441 U.S. 1 (1979) 9, 11, 13, 15, 16, 20, 26
Business Elecs. Corp. v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988) 11, 22
California v. *American Stores Co.*, 495 U.S. 271 (1990) 16
California Dental Ass'n v. *FTC*, 526 U.S. 756 (1999) 21
Chicago Prof'l Sports Ltd. P'ship v. *NBA*, 961 F.2d 667 (7th Cir.), cert. denied, 506 U.S. 954 (1992) 20
Citizen Publishing Co. v. *United States*, 394 U.S. 131 (1969) 19, 20
Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) 7, 10, 11, 29
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 8, 12, 14, 19
Dr. Miles Med. Co. v. *John D. Park & Sons, Co.*, 220 U.S. 373 (1911) 15
FTC v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) 11, 21
Freeman v. *San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir.), cert. denied, 540 U.S. 940 (2003) 26
General Leaseways, Inc. v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984) 25
Los Angeles Mem'l Coliseum Comm'n v. *NFL*, 726 F.2d 1381, 1395 (9th Cir.), cert. denied, 469 U.S. 990 (1984) 22

Cases—Continued: Page

National Bancard Corp. v. *Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir.), cert. denied, 479 U.S. 923 (1986) 26

National Soc'y of Prof'l Eng'rs v. *United States*, 435 U.S. 679 (1978) 23

NCAA v. *Board of Regents*, 468 U.S. 85 (1984) 11, 18, 20, 21

NFL v. *North Am. Soccer League*, 459 U.S. 1074 (1982) 25

New York v. *Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995) 16

Northern Pac. Ry. Co. v. *United States*, 356 U.S. 1 (1958) 11

Polk Bros., Inc. v. *Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) 23,.25

Polygram Holding, Inc. v. *FTC*, No. 03-1293, 2005 WL 1704732 (D.C. Cir. July 22, 2005) 21, 28

Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), cert. denied, 479 U.S. 1033 (1987) 22, 23, 25, 28

SCFC ILC, Inc. v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995) 24

Shell Oil Co., In re., 125 F.T.C. 769 (1998) ... 1, 4, 5, 8, 18

State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 11, 30

Stop & Shop Supermarket Co. v. *Blue Cross & Blue Shield*, 373 F.3d 57(1st Cir. 2004) 28

Sullivan v. *NFL*, 34 F.3d 1091 (1st Cir. 1994), cert. denied, 513 U.S. 1190 (1995) 24

Cases—Continued: Page

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 16

United States v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899) 22, 23, 24

United States v. *Citizen Publ'g Co.*, 280 F. Supp. 978 (D. Ariz. 1968) 20

United States v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) 24

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 29

United States v. *Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), cert. denied, 125 S. Ct. 45 (2004) 24

Statutes:

Clayton Act, § 7, 15 U.S.C. 18 ..... 4, 20

Robinson-Patman Act, 15 U.S.C. 13 7

Sherman Act, § 1, 15 U.S.C. 1 *et al.* 2, 5, 11, 12, 14, 19

Miscellaneous:

Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775 (1965) 22

Chevron Corp., In re, No. C-4023 (FTC Jan. 2, 2002)<www.ftc.gov/os/2002/01/chevronorder.pdf> 3

Miscellaneous—Continued: Page

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p. 48,143 3

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Vol. 11 22

Vol. 13 ..... 15, 17, 29

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission (FTC) have primary responsibility for enforcing the federal antitrust laws. The FTC reviewed the transaction that created the joint ventures at issue in this case. See *In re Shell Oil Co.*, 125 F.T.C. 769 (1998); FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). More generally, the agencies share a strong interest in the proper application of the per se rule in civil and, in the case of the Department of Justice, criminal enforcement proceedings.

STATEMENT

Petitioners Shell Oil Co. (Shell) and Texaco, Inc. (Texaco) formed two joint ventures to combine the refining and marketing of their gasoline products within the United States. Respondents, a class of 23,000 gas station owners, brought a suit alleging that petitioners violated the antitrust laws by agreeing that each joint venture would unify its pricing of the Shell and Texaco brands of gasoline sold by the venture. Respondents contended that the agreement constituted a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court rejected that theory of liability and granted summary judgment in favor of petitioners, but the court of appeals, in a divided decision, reversed. See Pet. App. 1a-33a, 46a-69a.[1]

1. Petitioners were once "fierce competitors" in all aspects of the oil and gasoline markets. Pet. App. 3a. In 1998, however, they formed a "nationwide alliance" through two wholly owned joint ventures that encompassed their "downstream" operations (i.e., those operations relating to the refining, distribution, and sale of gasoline) in the United States. *Id.* at 3a-4a. Petitioners formed Equilon Enterprises to refine, transport, and market Shell and Texaco gasoline products in the western United States. *Id.* at 4a. Together with a third joint-venture partner, they formed Motiva Enterprises to assume the same responsibilities in the eastern United States. *Ibid.*[2] Petitioners transferred all of their

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[1] "Pet. App." refers to the petition appendix in No. 04-805.

[2] The district court granted summary judgment to the third joint-venture partner because none of the named respondents had ever purchased gasoline from Motiva. Pet. App. 40a. The court of appeals affirmed on that point. *Id.* at 10a-12a. Accordingly, the balance of this

domestic downstream assets to those joint ventures and ceased competing in the downstream U.S. markets. *Id.* at 5a, 37a.

Petitioners continued to compete with each other in their domestic "upstream" operations (*e.g.*, those operations involving the exploration and production of crude oil), in their foreign operations, and in operations unrelated to refining and marketing gasoline (*e.g.*, their chemical, aviation fuels, and marine fuels businesses). See Pet. App. 5a, 56a. In addition, each company "retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand." *Id.* at 5a; see *id.* at 58a.[3]

Under the terms of the consummated alliance, petitioners granted Equilon an exclusive license to sell gasoline under their brand names in Equilon's geographic region. Although the Texaco and Shell brands maintained their "own unique chemical composition (the gasoline is differentiated by separate packages of 'additives'), trademark, and marketing strategy," Pet. App. 6a-7a, both brands were sold exclusively by Equilon. At

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brief primarily addresses Equilon, although the same analysis would apply equally to its sister venture, Motiva.

[3] Shell has since bought out Texaco's interest in Equilon and Motiva, in accordance with the conditions that the FTC imposed on the 2002 combination of Texaco and Chevron. See *In re Chevron Corp.*, No. C-4023 (FTC Jan. 2, 2002) <http://www.ftc.gov/os/2002/01/chevronorder.pdf>. The FTC pointed out at that time that "[a]ll assets in each portion of the Alliance already are under common ownership and control, and divestiture of these interests to Shell * * * would closely maintain the situation that currently exists." FTC, *Analysis to Aid Public Comment*, 66 Fed. Reg. 48,143 (2001).

some point, "a decision was made" that Equilon would sell Shell-branded and Texaco-branded gasoline at the "same price in the same market areas," leaving to Equilon the determination of that price. *Id.* at 6a.

Petitioners provided as part of their alliance that Equilon's profits (or losses), as well as Motiva's, would be divided between petitioners in a fixed ratio based on the assets each contributed to the ventures. Pet. App. 5a. Thus, each petitioner's returns were determined by the ventures' total profits and not by the relative sales of Shell-branded or Texaco-branded gasoline. Each joint venture was terminable by mutual consent at any time, or unilaterally after five years (subject to specified notice provisions). *Ibid.*

The FTC and four western state attorneys general investigated the transactions. Pet. App. 5a. The FTC issued a complaint alleging that the combinations, as originally proposed, would violate Section 7 of the Clayton Act, which prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition." 15 U.S.C. 18. See *In re Shell Oil Co.*, 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent undue concentration in certain downstream markets, but did not impose any restrictions on pricing decisions respecting the joint ventures' sale of Shell and Texaco products. See *id.* at 778-811.

2. The district court granted petitioners summary judgment, holding in relevant part that respondents had "failed to raise a triable issue of material fact" on whether petitioners have engaged in per se unlawful "price fixing." Pet. App. 68a. The court noted that respondents had "eschewed an exhaustive rule of reason

analysis" and instead asserted liability only "under the per se or quick look doctrines." *Ibid.*; see *id.* at 7a, 47a. The district court accordingly found no need to engage in a rule of reason inquiry in resolving the issues before it. See *id.* at 68a.

The district court rejected respondents' contentions that an agreement between petitioners to unify Equilon's pricing for Shell-branded and Texaco-branded gasoline in each local area would constitute per se unlawful horizontal price fixing in violation of Section 1 of the Sherman Act. Pet. App. 52a-54a. The court observed that "every * * * joint venture must, at some point, set prices for the products they sell." *Id.* at 53a. Respondents' theory, the court explained, would essentially "act as a per se rule against joint ventures between companies that produce competing products." *Id.* at 54a.

3. A divided panel of the court of appeals reversed the district court's grant of summary judgment. Pet. App. 1a-33a. The panel remanded the case for further proceedings to determine whether petitioners had committed a per se violation of the Sherman Act by agreeing to unify the prices for the two gasoline brands sold by the joint ventures. *Id.* at 21a-23a, 27a-28a.

The court of appeals viewed the case as presenting the question whether the courts should "find an exception to the *per se* prohibition on price-fixing where two entities have established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands." Pet. App. 12a-13a.[4] The court did not take

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[4] The court assumed that petitioners reached an agreement to unify prices at the formation of their alliance. See Pet. App. 13a ("the

issue with the district court's conclusion that Equilon and Motiva were "legitimate" efficiency-enhancing joint ventures. *Id.* at 4a-5a, 9a, 16a. Invoking the ancillary restraints doctrine, however, the court concluded that the agreement to unify prices was a "naked" restraint, *id.* at 16a-17a, in the absence of a showing that it was "reasonably necessary to further the legitimate aims of the joint venture," *id.* at 21a.

The court of appeals was not persuaded by petitioners' justifications for the agreement. First, the court rejected petitioners' argument that application of the per se rule would interfere with the ability of joint ventures to set prices for their products. Pet. App. 26a-27a. In the court's view, the "question is whether two former (and potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands." *Ibid.* The per se rule applies, the court stated, "when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and

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companies fixed the prices * * * by agreeing *ex ante* to charge the exact same price for each"); *id.* at 19a (noting evidence "that the decision to unify the pricing of the Texaco and Shell brands was made contemporaneously with the formation of the alliance, but before the actual joint ventures officially existed"); *id.* at 19a n.11 ("there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands"). See also *id.* at 6a (the "decision to charge the same price for the two distinct brands 'was developed as sort of an operating requirement right from the very start or near to the very start of the alliance'"); *id.* at 22a (petitioners "*unified* the pricing of the two brands from the time the alliance was formed"). Neither the panel majority nor respondents have suggested that the agreement to unify prices—regardless of its timing—affected the prices of any product sold by Texaco or Shell.

furthering the legitimate aims of the joint venture—a relationship that justifies the otherwise prohibited price restraints." *Id.* at 27a. "Thus far," the court concluded, petitioners had failed to produce evidence "demonstrating that their price fixing scheme was ancillary rather than naked." *Ibid.* Second, the court rejected respondents' claim that the challenged agreement was intended to avoid potential suits for price discrimination under the Robinson-Patman Act, 15 U.S.C. 13, on the ground that the Robinson-Patman proscriptions were "unquestionably * * * inapplicable." *Id.* at 25a.

Judge Fernandez dissented in relevant part. Pet. App. 28a-33a. He observed that Equilon, rather than petitioners, competed in the business of refining, transporting, and marketing gasoline in the western United States. Equilon "ran the refinery; it had the research facilities; it transported products; and it dealt with the station operators and other buyers. It also priced the products, and set the same price for *its* Shell and Texaco brands." *Id.* at 29a. In his view, "nothing more radical is afoot than the fact that an entity * * * prices its own products." *Id.* at 31a-32a.

SUMMARY OF ARGUMENT

A. The court of appeals fundamentally erred in holding that petitioners may have committed a per se violation of Section 1 of the Sherman Act by agreeing to unify the prices for the two brands of gasoline produced and sold by their lawful joint ventures. Per se condemnation is reserved for conduct that is "manifestly anticompetitive." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977). Per se conduct involves predictably pernicious restraints on competition that have virtually no potential benefit to consumers,

such as agreements *among competitors* to fix prices, allocate markets, or limit output. The pricing agreement at issue here does not qualify because that agreement, as distinct from the decision to create the joint venture, did not eliminate any competition between petitioners in the sale of their respective brands.

Petitioners' formation of Equilon—a legitimate joint venture—effectively merged their downstream operations, giving that entity control over the sale of both Texaco-branded and Shell-branded gasoline and terminating petitioners' prior competition with respect to the refining and sale of gasoline in the western United States. Petitioners' challenged agreement, as co-owners of Equilon, that Equilon would set a unitary price for the distinct brands of gasoline did not alter the fact that petitioners were no longer competitors. Petitioners could have agreed to market a single brand of Equilon gasoline at a fixed price, and their decision to maintain two brands at the same price does not remotely merit per se condemnation. Section 1 does not address competition between brands under the exclusive control of a unitary company. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

B. The court of appeals also improperly invoked the ancillary restraints doctrine to cabin the effect of its erroneous application of per se principles. The court asserted that petitioners were required to demonstrate that the challenged agreement was reasonably necessary to achieve the purposes of the joint venture in order to avoid per se condemnation. The ancillary restraints doctrine, however, allows an agreement that would otherwise be viewed as per se invalid to be evaluated in light of the procompetitive effects of an

efficiency-enhancing integration of economic activity to which it is reasonably related.

The ancillary restraints doctrine has been applied to restrictions on joint venture partners' conduct outside the venture, and to rules affecting venture membership, which may be viewed as concerted refusals to deal. But the doctrine does not apply to an agreement that does not itself eliminate any competition. In particular, it has no proper role when a challenged restraint affects only a legitimate joint venture's *own* conduct as a competitor in the market, especially when the joint venture partners do not separately participate in that market. Contrary to the court of appeals' premise, the owners of a legitimate joint venture are not required to assume the burden of demonstrating that each decision about the joint venture's conduct is reasonably necessary to achieve the venture's purposes, and their failure to do so does not convert each such decision into a restraint of trade subject to the per se rule.

C. Extending per se condemnation to agreements that do not "always or almost always tend to restrict competition and decrease output," *BMI* v. *CBS, Inc.*, 441 U.S. 1, 19-20 (1979), would deter lawful conduct and constrain efficiency-enhancing commercial undertakings. In this case, subjecting a legitimate joint venture to per se condemnation for setting a pricing policy for the venture's own products would needlessly interfere with the venture's pricing decisions and pointlessly impair efficient competition to the detriment of consumers. Moreover, the court of appeals' expansion of the per se rule potentially undercuts that rule's value in facilitating effective enforcement of the antitrust laws. The Department of Justice's criminal enforcement program depends on a sharp demarcation between conduct

evaluated under the rule of reason and conduct that is unlawful per se. Subjecting agreements among joint venture participants that likely are not anticompetitive to per se condemnation would blur that demarcation and undermine the rationale for the per se rule.

ARGUMENT

AN AGREEMENT BETWEEN THE OWNERS OF A LEGITIMATE JOINT VENTURE RESPECTING THE PRICING OF THE JOINT VENTURE'S PRODUCTS IS NOT SUBJECT TO PER SE CONDEMNATION

The court of appeals mistakenly condemned as per se invalid an agreement between owners of a lawful joint venture respecting the pricing of the joint venture's own products, ruling that the agreement is unlawful per se unless the owners can justify it as an ancillary restraint that reasonably furthers the legitimate aims of the venture. The court's decision reflects a fundamentally flawed understanding of the proper role of per se analysis and the ancillary restraints doctrine. That decision, which threatens to chill efficiency-enhancing ventures that promote vigorous competition and benefit consumers, should be reversed.

A. The Court Of Appeals Improperly Extended Per Se Analysis To An Agreement That Does Not Restrain Competition

1. This Court has properly construed the Sherman Act to confine the role of per se rules in identifying anticompetitive activity. The rule of reason is the "prevailing standard of analysis" under the Sherman Act, and any departure from that standard "must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing." *Continental T.V., Inc.* v.

GTE Sylvania Inc., 433 U.S. 36, 49, 59 (1977). See *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard"). Departures from rule of reason analysis are limited to those "restraints * * * hav[ing] such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997) (citing *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958)).

Accordingly, per se rules—which obviate proof that the challenged conduct in a particular case unreasonably restrains competition—are "appropriate only when they relate to conduct that is manifestly anticompetitive," *GTE Sylvania*, 433 U.S. at 50, such as a horizontal agreement among competitors to fix prices or restrict output. See, *e.g.*, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986) (expressing reluctance to adopt per se rules with regard to "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious").[5] Per se condemnation is inappropriate in the absence of a determination that the defendant's behavior and the "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA* v. *Board of Regents*, 468 U.S. 85, 103-104 (1984).[6]

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[5] See also *BMI* v. *CBS, Inc.*, 441 U.S. 1, 19-20 (1979) (per se treatment appropriate when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output").

[6] Texaco argues that Section 1 of the Sherman Act does not apply at all to the conduct alleged in this case because respondents in fact challenge the pricing decisions of the joint venture, not a pricing

2. The court of appeals erred in concluding that petitioners' agreement to unify the pricing of Equilon's Texaco-branded and Shell-branded gasoline could be unlawful per se under Section 1 of the Sherman Act. An agreement by the participants in a lawful joint venture to determine the price of the joint venture's products is not "price-fixing" within the meaning of the antitrust laws. There is no suggestion here that the joint venture is a sham to mask cartel conduct; rather, the courts below recognized that the venture is an efficiency-enhancing integration of the participants' businesses. It would make no difference whether petitioners agreed to unify the pricing of products after the joint venture became operational. The joint venture participants are entitled to set the price for the joint venture products whether marketed under the joint venture's own single brand or under the preexisting brands of the joint venture owners because the lawful formation of the joint venture eliminated competition between the joint venture participants' downstream operations.

a. The court of appeals erred at the outset by characterizing the alleged agreement between petitioners to unify the pricing of the joint ventures' products as

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agreement between petitioners. Texaco Pet. 10-13, 18-22; Texaco Supp. Br. 3-4. This Court, however, need not reach that argument. Texaco acknowledges that "the decision of two companies to form a joint venture itself is a 'merging of resources' to which Section 1 applies." Texaco Pet. 18 (quoting *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984)). The court of appeals, in reviewing the district court's grant of summary judgment to petitioners, based its decision on the disputed factual premise that petitioners reached an agreement to unify pricing at or before the joint venture's formation. See Pet. App. 19a & n.11; see also note 4, *supra*. For the reasons explained below, even assuming that factual premise is correct, the court was mistaken in concluding that the agreement is subject to per se condemnation.

"price-fixing." Pet. App. 16a. See *id.* at 26a-27a ("The question is whether two former * * * competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands."). The court's characterization inaccurately portrays the substance of the agreement at issue by substituting an inapt label in place of an analysis of the agreement's significance and effect. See *BMI* v. *CBS, Inc.*, 441 U.S. 1, 8 (1979) ("easy labels do not always supply ready answers").[7]

Petitioners' agreement was not "price fixing" as that term is "generally used in the antitrust field," *BMI*, 441 U.S. at 9, because it did not eliminate any competition that would otherwise have existed between competitors. Equilon's *formation* eliminated all price and non-price competition between petitioners with respect to the refining and sale of gasoline in the western United States. As the court of appeals and respondents have recognized, after Equilon became operational, Shell and Texaco ceased their separate participation in the relevant domestic downstream markets. See Pet. App. 5a; Br. in Opp. 5.[8]

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[7] In *BMI*, this Court rejected the argument that participants in a legitimate joint venture engage in price fixing subject to the per se rule when they set the price at which the venture sells its products to third parties. The Court noted that such a practice cannot be categorically described as "'plainly anticompetitive' and very likely without 'redeeming virtue.'" 441 U.S. at 9. As the Court observed, "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Ibid.* See *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) (blanket license in *BMI* "was not a species of the price-fixing agreements categorically forbidden by the Sherman Act").

[8] Respondents observe that petitioners' alliance could be unwound at some point. See Br. in Opp. 10. But that observation does not alter

The court of appeals expressed general concern that Equilon could sell gasoline under the distinct Shell and Texaco brands at the same price. Pet. App. 12a-13a. But this Court has made clear that Section 1 of the Sherman Act is not concerned with competition between brands under the exclusive control of a unitary company. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (rejecting intra-enterprise conspiracy doctrine). As a consequence of their joint venture, petitioners no longer competed in the domestic retail sale of gasoline—*regardless* of how they (or Equilon itself) chose to price the distinctly branded products sold by Equilon. A remedial order compelling Equilon to price the brands independently would not

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the analysis in this case. The district court recognized that, in light of petitioners' extensive financial commitments and operational integration, the mere existence of termination provisions in the Equilon and Motiva joint ventures did not call into question either venture's legality. Pet. App. 58a-60a. Moreover, the court of appeals did not suggest that the pricing policy for Equilon was likely to affect any activity after a hypothetical unwinding. As a general matter, *all* joint ventures can be unwound. The Department of Justice (DOJ) and the FTC have recognized that the duration of a joint venture may affect the antitrust calculus, and their *Competitor Collaboration Guidelines* correspondingly provide that a joint venture generally cannot be treated as a merger if it has a term of less than ten years. See DOJ & FTC, *Antitrust Guidelines for Collaborations Among Competitors* § 1.3 (Apr. 2000) (*Competitor Collaboration Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (Apr. 12, 2000) <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>, discussed at note 11, *infra*. Petitioners' alliance did not terminate by its own terms within ten years and therefore satisfied the relevant durational term for treatment as a merger. See C.A. Appellees' Supp. E.R. 1207, 1257-1258. Of course, if a joint venture unwinds and the venture partners resume separate participation in the market, Section 1 would apply to any subsequent agreements between them.

alter petitioners' status as non-competing participants in a joint venture. The court of appeals did not identify any competition—beyond the assumed but non-existent competition between Shell and Texaco—that the pricing agreement could threaten.[9]

b. The court of appeals' error is strikingly apparent when viewed in the context of Equilon's formation. The formation of a joint venture by competitors may be unlawful per se if it does not involve an efficiency-

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[9] While it is conceivable that a pricing agreement among joint venture participants could affect competition outside the joint venture, neither the court of appeals nor respondents have identified any such anticompetitive activity in this case. For example, if a joint venture is a supplier of inputs to the venture participants, the venture can conceivably facilitate a cartel by artificially inflating the venture participants' input costs. But no one has suggested such a relationship between the joint venture and the venture participants here. And because the two joint venture participants did not have a vertical relationship in the domestic downstream markets—neither sold gasoline or pipeline services to the other—they were not postured to enter into a per se unlawful vertical price fixing agreement. Cf. *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). Petitioners did continue to compete outside their joint ventures' spheres. Pet. App. 56a; Shell Pet. 3. Respondents, however, have not argued that the agreement to unify Equilon's prices of Texaco-branded and Shell-branded gasoline affected competition in those other markets. For example, there is no indication that petitioners used the pricing agreement to manipulate the value of the companies' trademarks or to facilitate price fixing in markets where the two companies continued to compete. See *BMI*, 441 U.S. at 23-24 (distinguishing situation in which competing copyright holders "use the blanket license to mask price fixing in such other markets"). Cf. 13 Herbert Hovenkamp, *Antitrust Law* ¶ 2122b, at 132 (2d ed. 2005) (a joint venture may pose a threat to competition if it "eliminat[es] the competition that exists between the joint venture participants outside the venture. This might happen if the joint venture becomes an excuse for price fixing with respect to the venturers' nonventure business").

enhancing integration of economic activity. See, *e.g.*, *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356-357 (1982); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597-598 (1951). There is no basis for serious suggestion in this case, however, that the formation of Equilon was itself subject to per se condemnation. The FTC thoroughly reviewed petitioners' alliance,[10] and it is undisputed on this record that Equilon was an efficiency-enhancing venture. Pet. App. 4a-5a, 9a, 50a.

The formation of efficiency-enhancing joint ventures like Equilon is "judged under a rule of reason" because they "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld*, 467 U.S. at 768. See also 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478a, at 318 (2d ed. 2003) (a "venture's formation results from the founders' 'agreement,' which, like any other formation agreement, can be appraised for 'reasonableness' under Sherman Act § 1"). Furthermore, joint ventures (like Equilon) that involve a high degree of efficiency-enhancing integration, have a substantial duration, and

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[10] See FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). Review by federal antitrust regulators does not, of course, prevent further judicial review. The entry of a government consent decree provides powerful evidence of the lawfulness of a merger or joint venture, see *BMI*, 441 U.S. at 13, 16, but it does not place the transaction beyond further judicial examination. See, *e.g.*, *California* v. *American Stores Co.*, 495 U.S. 271 (1990) (California successfully challenged supermarket merger despite FTC's review of the transaction); see also *New York* v. *Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995).

eliminate relevant competition between the venture partners, can appropriately be treated as mergers.[11]

The FTC accordingly evaluated Equilon's formation under the rule of reason as a merger of petitioners' downstream operations in the western United States. See FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). The FTC applied the antitrust enforcement standards that the Justice Department and the FTC apply to mergers, and it evaluated the joint venture in essentially the same way that it would have analyzed the complete merger of Shell and Texaco if they had no operations other than downstream operations.

As a result of the ensuing evaluation, the FTC issued a complaint alleging that petitioners' alliance, as originally proposed, would substantially lessen competition in seven distinct markets in which the combined operation would have an excessively high market share.

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[11] Section 1.3 of the *Competitor Collaboration Guidelines*, note 8, *supra*, spells out the conditions under which a competitor collaboration "ordinarily" should be treated as a horizontal merger and analyzed under the agencies' *Horizontal Merger Guidelines*:

> (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period [ordinarily, ten years] by its own specific and express terms.

Competitor Collaboration Guidelines § 1.3 (footnotes omitted). (The *Horizontal Merger Guidelines* are reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 2, 1992, rev. Apr. 8, 1997) <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>.). See also 13 Hovenkamp, *supra*, ¶ 2121c, at 127-129 (describing when production joint ventures should be treated as mergers); *id.* ¶ 2123d, at 147.

In re Shell Oil Co., 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners consequently entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent such harm, but did not impose any restrictions on pricing decisions respecting the joint ventures' sale of Shell and Texaco products. See *id.* at 778-811.

The court of appeals in this case did not question the FTC's judgment that petitioners, upon satisfying certain conditions, could create a lawful joint venture, nor did the court hold or suggest that the ultimate formation of Equilon violated the antitrust laws. That formation effectively merged petitioners' operations in the refining and sale of gasoline in the western United States and eliminated all downstream competition between them. Because petitioners lawfully ceased to compete in the relevant markets at the same time that they implemented the challenged agreement respecting the pricing of the joint venture's products, that agreement cannot qualify as a naked restraint among competitors that would warrant per se condemnation.

c. Per se treatment would also be inappropriate even if, contrary to the court of appeals' premise, petitioners' agreement to unify the pricing of the two brands occurred *after* Equilon became operational. At that point, petitioners were not independent participants in the downstream markets and therefore were incapable of forming a horizontal agreement within the contemplation of the antitrust laws—i.e., "an agreement among competitors on the way in which they will compete with one another," *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984)—with respect to operations in those markets. Rather, petitioners would have been acting solely in their capacity as owners of a market-

place participant. See *Maricopa County Med. Soc'y*, 457 U.S. at 356 ("partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit" are "regarded as a single firm competing with other sellers in the market"). The decision at that point should be no more subject to per se condemnation than the decision to market a single brand of Equilon gasoline at a certain price. This Court's decision in *Copperweld*, which makes clear that the independent conduct of a unitary economic actor cannot give rise to Section 1 liability, would preclude any application of Section 1 in that context. See *Copperweld*, 467 U.S. at 771.

d. Because petitioners' lawful formation of the joint venture—and not their alleged pricing agreement—eliminated competition between petitioners, the court of appeals' and respondents' reliance on *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), is misplaced. See Pet. App. 17a-20a; Supp. Br. in Opp. 9 n.8. In *Citizen Publishing*, an Arizona city's only two daily newspapers formed a jointly owned entity to set prices collectively and pool profits, while each newspaper retained its separate corporate identity and continued to produce its own news and editorial content. 394 U.S. at 133-134. The United States challenged the newspapers' agreement, which was intended "to end any business or commercial competition between the two papers." *Id.* at 134. This Court concluded that the arrangement was anticompetitive and that the antitrust violations were "plain beyond peradventure." *Id.* at 135. The Court did not accept the newspapers' contention that a merger or combination of the two newspapers would have been a legitimate, efficiency-enhancing

venture. To the contrary, when the two newspapers subsequently attempted to merge pursuant to an option in the joint operating agreement, the merger was held unlawful under Section 7 of the Clayton Act, 15 U.S.C. 18. See *Citizen Publ'g*, 394 U.S. at 134-135; *United States* v. *Citizen Publ'g Co.*, 280 F. Supp. 978, 983-984, 993, 994 (D. Ariz. 1968).

Here, by contrast, the court of appeals did not question that the formation of the joint venture was lawful. And the challenged agreement to unify the pricing of Equilon's two brands of gasoline did not eliminate any competition that would otherwise have existed. Accordingly, *Citizen Publishing* is simply not on point.[12]

3. In sum, because the challenged agreement to unify prices could not, and did not, itself eliminate competition, there is no basis for subjecting that agreement to per se condemnation. See *BMI*, 441 U.S. at 23 ("[m]ergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard"); *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 961 F.2d 667, 671 (7th Cir.) ("agreements among business rivals to fix prices are unlawful *per se*, although a merger of the same firms, even more effective in eliminating competition among them, might be approved with little ado"), cert. denied, 506 U.S. 954 (1992). Because respondents alleged only a classic "price fixing scheme," and have "disclaimed any reliance

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[12] Furthermore, the decision in *Citizen Publishing* predates this Court's elaboration of the limits of the per se rule. See *NCAA*, 468 U.S. at 100-104; *BMI*, 441 U.S. at 8-10, 19-20. The Court's analysis in *Citizen Publishing* focused on the failing firm defense, not the proper application of the per se rule. See 394 U.S. at 136-139.

on the traditional 'rule of reason' test," Pet. App. 7a, the failure of their per se theory necessitates reversal.[13]

B. The Court Of Appeals Erred By Invoking The Ancillary Restraints Doctrine In This Case

The court of appeals compounded its error by invoking the ancillary restraints doctrine to limit the reach of its mistaken application of per se principles. Having concluded that petitioners' agreement to unify the prices of the joint venture's separately branded products constituted unlawful "price fixing," the court held that petitioners could avoid per se condemnation only by showing that the agreement was "ancillary" to and "reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 15a-18a, 21a; see

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[13] The court of appeals noted that respondents also asserted a "quick look" theory, but it declined to reach that theory of liability. Pet. App. 7a, 13a n.7. Quick look analysis, however, is available only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770 (1999). Respondents offer nothing beyond the formalistic "price fixing" label to explain why or how petitioners' agreement to unify Equilon's prices, independent of the joint venture agreement itself, could have an "anticompetitive effect on customers and markets." Their quick look theory, therefore, should be dismissed as well. See *Indiana Fed'n of Dentists*, 476 U.S. at 455, 460-461 (1986) (dentists formed "federation" for the "primary purpose" of suppressing competition on a particular service, and factfinder had found "proof of actual detrimental effects" from that practice); *NCAA*, 468 U.S. at 106-108 (the "anticompetitive consequences" of the NCAA's limitation on member schools' ability to televise football games was not only "apparent," but had already been found); *Polygram Holding, Inc.* v. *FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005) (venturers required to justify their restraint on "price cutting and advertising with respect to products *not part of the joint venture*") (emphasis added). Cf. Supp. Br. in Opp. 4-5.

id. at 22a & n.14, 27a. Respondents' detailed defense of the manner in which the court of appeals applied the doctrine, Supp. Br. in Opp. 3-9, misses the point. The court of appeals did not *mis*apply the ancillary restraints doctrine. Rather, that court erred *by* applying the ancillary restraints doctrine at all.

1. Judge Taft's decision in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899), which recognized that certain consensual restraints may ultimately promote competition, introduced the ancillary restraints doctrine into antitrust law. That doctrine "teaches that some agreements which restrain competition may be valid if they are 'subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.'" *Los Angeles Mem'l Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1395 (9th Cir.) (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 797-798 (1965)), cert. denied, 469 U.S. 990 (1984).[14] Application of the doctrine requires examination of whether a challenged agreement is reasonably designed to further the procompetitive aspects of the joint venture.[15]

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[14] "To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), cert. denied, 479 U.S. 1033 (1987). "The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Business Elecs. Corp.*, 485 U.S. at 729 n.3.

[15] See *Rothery Storage & Van*, 792 F.2d at 227 (restraint was "reasonably necessary"); *Addyston Pipe*, 85 F. at 290-291 (must be "commensurate"); 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1912c at

The purpose of the ancillary restraints doctrine is thus to determine whether an agreement that would otherwise be condemned as a per se invalid restraint of trade should instead be analyzed under the rule of reason as part of an efficiency-enhancing integration of economic activity.[16] The doctrine serves an important role in distinguishing legitimate cooperative activity from sham undertakings designed to disguise "an old-fashioned price fixing cartel." Pet. App. 50a. The federal enforcement agencies, for example, apply the per se rule to agreements "of a type that always or almost always tend to raise price or reduce output," and the Department of Justice may prosecute them criminally, but the agencies apply the rule of reason when "participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits." *Competitor Collaboration Guidelines* § 3.2. The court of appeals' hypothetical example of two soft drink companies entering into a joint research venture accompanied by an agreement to fix the price at which each sells its own unrelated products, Pet. App. 16a, illus-

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320 (2d ed. 2005) ("An ancillary restraint is one that is reasonably related to a joint venture or transaction that, at least upon initial examination, promises to increase output, reduce costs, improve product quality, or otherwise benefit consumers.").

[16] See *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 689 (1978) (the rule of reason "has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction"). See also *Addamax Corp.* v. *Open Software Found.*, 152 F.3d 48, 51-52 (1st Cir. 1998); *Rothery Storage & Van*, 792 F.2d at 224; *Polk Bros.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 188-190 (7th Cir. 1985); 11 Hovenkamp, *supra*, ¶ 1908a at 251-252.

trates the type of restraint to which the per se rule is properly applied, notwithstanding any ancillary restraint defense that the soft drink companies might raise. Those companies' agreement to fix the price at which *they* independently sell products outside the scope of the joint research venture has no apparent relationship to the venture, and thus does not qualify for rule of reason analysis.

Since Judge Taft's first articulation in *Addyston Pipe*, 85 F. at 280, courts have invoked the ancillary restraints doctrine in two general circumstances. First, courts have applied the doctrine to restraints on admission to joint ventures, distinguishing between unlawful concerted refusals to deal and agreed-upon rules reasonably related to achieving a legitimate joint venture's efficiency-enhancing purposes. See, *e.g.*, *Sullivan* v. *NFL*, 34 F.3d 1091, 1102-1103 (1st Cir. 1994), ("accept[ing], for purposes of this appeal, that rules controlling who may join a joint venture can be ancillary to a legitimate joint activity and that the NFL's own policy against public ownership constitutes one example of such an ancillary rule"), cert. denied, 513 U.S. 1190 (1995).[17]

Second, courts have required joint venture partners to demonstrate the reasonable necessity of restrictions on their own conduct outside the venture. For example, charge card joint ventures must demonstrate the reasonable necessity of an agreement that members not issue certain competing cards. See *United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003), cert. denied, 125 S. Ct. 45 (2004). Lawyers dissolving their

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[17] See also *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 968 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1374-1387 (5th Cir. 1980).

partnership must demonstrate the reasonable necessity of agreed-upon territorial restrictions on advertising by the former partners. See *Blackburn* v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995). Truck leasing companies agreeing to provide service for each others' trucks must demonstrate the reasonable necessity of adopting territorial restrictions on leasing competition. See *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984).[18]

2. The court of appeals' invocation of the ancillary restraints doctrine is an aberrant departure from settled law. This case does not involve either of the classic examples of joint venture ancillary restraints—namely, agreements restraining joint venture membership or member conduct *outside* of the joint venture. Nor does it involve any other type of concerted activity that would normally be subject to analysis under the per se rule. Instead, the court below applied the ancillary restraints doctrine to an agreement relating solely to the joint venture's *own* conduct. The government is unaware of any other case in which the ancillary restraints doctrine has been so applied.

Respondents argue otherwise, but the cases that they cite do not support their position. See Supp. Br. in Opp. 6. Contrary to respondents' suggestion, the ancil-

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[18] See also *NFL* v. *North Am. Soccer League*, 459 U.S. 1074, 1077-1078 (1982) (Rehnquist, J., dissenting from denial of certiorari) (applying ancillary restraints doctrine to a sports league's restraint on members' ownership of other sports teams); *Polk Bros.*, 776 F.2d at 188-190 (applying ancillary restraints doctrine to limitation on which products joint venturers could sell in their adjacent retail stores); *Rothery Storage & Van*, 792 F.2d at 223-230 (applying ancillary restraints doctrine to prohibition against moving company's agents using joint venture property for non-venture business).

lary restraints doctrine played no role in this Court's decision in *BMI*. This Court held *without* regard to that doctrine that the rule of reason, rather than the per se rule, governed the blanket licensing agreements at issue in that case. See 441 U.S. at 18-24. In *Freeman* v. *San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir.), cert. denied, 540 U.S. 940 (2003), the court emphasized that the joint venture partners whose agreement was condemned as unlawful per se remained competitors and that the challenged agreements restrained competition among them. *Id.* at 1149-1150. And in *National Bancard Corp.* v. *Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir.), cert. denied, 479 U.S. 923 (1986), the court addressed an agreement—respecting the rate at which banks compensated each other for handling credit card transactions—that restrained banks as individual competitors. See *id.* at 602.[19]

Respondents have put forward no basis for invoking the ancillary restraints doctrine. The fundamental fact remains that petitioners, in the course of creating Equilon, have exited from the markets in which Equilon now competes. Petitioners' alleged pricing agreement respecting Shell-branded and Texaco-branded products does not restrain competition because petitioners do not compete with each other or with Equilon in the market

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[19] In *National Bankcard*, the banks formed a joint venture credit card system but continued to compete against each other for the patronage of consumers and merchants. The challenged agreement, by setting a uniform rate for handling each others' credit card transactions, restrained the banks as competitors. The court of appeals determined that the challenged agreement was ancillary because it "represent[ed] one such rule establishing a 'necessary' term, without which the system would not function," 779 F.2d at 602, and therefore applied the rule of reason.

for those products. The agreement is not properly subject to analysis under the per se rule, and there is accordingly no need to justify the agreement as a permissible ancillary restraint.[20]

3. The court of appeals' mistaken invocation of the ancillary restraints doctrine is not merely an academic error, but has serious practical repercussions. The court of appeals' decision suggests that joint venture partners can be required to justify, as reasonably necessary to the achievement of procompetitive ends, every choice they make about what the venture does or how it is done. If so burdened, few, if any, joint ventures could survive the onslaught of antitrust attacks.[21]

The inquiry that the court of appeals envisions is particularly burdensome because the court has extended it to an agreement about the pricing of the joint venture's own products, which is scarcely "collateral" to the

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[20] This distinction explains why Professor Areeda's hypothetical of a joint sales agency among Ford and General Motors (GM), like the court of appeals' soft drink hypothetical (see p. 23, *supra*) does not aid respondents. Cf. Supp. Br. in Opp. 8 n.5. Indeed, Professor Areeda's hypothetical does not even address the ancillary restraints doctrine. Rather, his point was that the *formation* of the Ford-GM sales agency was an obviously unreasonable restraint. Here, by contrast, the FTC reviewed petitioners' alliance, and the court of appeals did not suggest that the alliance's formation itself would violate the antitrust laws.

[21] To be sure, once a joint venture is operational, it acts as a single economic entity and may incur antitrust liability, like any other firm, if it acts to restrain competition in the market. For example, a joint venture does not have carte blanche to enter into bid-rigging agreements with rivals in the market. See also pp. 19-20, *supra* (joint venture's formation itself may be unlawful). But it is a far different matter to hold that the owners of a joint venture become subject to per se liability or an ancillary restraints inquiry merely by entering into agreements respecting joint venture operations—like the challenged agreement here—that do not restrain competition.

joint venture. See *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987). Indeed, under the court of appeals' rationale, per se liability could extend to a host of other basic decisions that joint venture partners must make concerning the scope of the venture's operations, any of which could be characterized as an agreement to limit the venture's output or raise its prices.[22]

The court of appeals attempted to justify its presumptive application of the per se rule by suggesting that equalizing prices across brands was not a "rational decision." Pet. App. 23a. But "the antitrust laws are not meant to police bad management," *Stop & Shop Supermarket Co.* v. *Blue Cross & Blue Shield*, 373 F.3d 57, 62 (1st Cir. 2004), and they provide no broad-ranging warrant for courts to regulate the efficiency of joint venture practices in the absence of an unreasonable restraint on competition. The ancillary restraints doctrine simply has no role to play in this case.

C. The Court Of Appeals' Result Is Inconsistent With The Procompetitive Purposes Of The Antitrust Laws

The court of appeals' improper expansion of per se liability to encompass agreements that are not "mani-

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[22] The courts have ample authority to examine restraints relating to the actions of joint venture owners outside of the venture. For example, the D.C. Circuit recently affirmed an FTC administrative order in *Polygram*, *supra*, condemning such a restraint without recourse to the per se rule. 416 F.3d at 31. Unlike here, that court squarely relied on the fact that the parties to a joint venture had imposed price and advertising restraints on "products that were not part of the joint undertaking" and that the venturers had continued to sell independently and in competition with their joint venture. *Id.* at 38.

festly anticompetitive," *GTE Sylvania*, 433 U.S. at 49-50, threatens to chill legitimate and beneficial economic activity by raising the specter of per se liability for efficiency-enhancing joint ventures that unite formerly competing products under common ownership and pricing control. The court of appeals' erroneous approach also could undercut the per se rule's value in facilitating effective enforcement of the antitrust laws. Per se rules establish bright-line tests that identify consistently pernicious conduct, thereby deterring unlawful behavior and providing clear guidance to businessmen and antitrust counselors. The court of appeals' decision both blurs the bright line and sweeps too broadly, thereby casting a shadow over decisions of numerous businesses and interfering with efficient antitrust enforcement.

Given the potentially serious consequences that attach to per se violations—including criminal and civil enforcement—private economic actors are entitled to know in advance what is per se unlawful and what is not. Production joint ventures, such as Equilon, are increasingly common and often have substantial procompetitive potential. See *Competitor Collaboration Guidelines* Preamble; *id.* § 2.1; 13 Hovenkamp, *supra*, ¶ 2121, at 125-127. The prospect of per se condemnation—and the accompanying risk of treble-damages liability—for conduct that may be integral to the operation of such a venture, such as pricing the products it sells, would no doubt chill procompetitive conduct.[23]

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[23] See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 (1978) ("procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment").

The Department of Justice itself has a particularly strong governmental interest in maintaining a sharp demarcation between conduct subject to the per se rule and that subject to the rule of reason. Effective criminal prosecution of hardcore cartel conduct—such as horizontal price fixing, bid rigging, and market allocation—would be immensely more difficult if defendants were permitted to complicate jury trials with extended arguments about the reasonableness of such practices.

Courts, agencies, and the business community likewise need to have confidence that the per se rule is applied only to conduct that is always—or virtually always—anticompetitive. Otherwise, courts may be understandably reluctant to apply the per se rule. Because the court of appeals' decision extends the per se rule to conduct that not only lacks "predictable and pernicious anticompetitive effect," but may even have substantial "potential for procompetitive benefit," *State Oil*, 522 U.S. at 10, it has the potential to erode the rationale for per se treatment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

TEXACO INC.,

Petitioner,

v.

FOUAD N. DAGHER, et al.,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a full-blown "rule of reason" analysis – including evidence of clear economic power in a precisely defined market – is essential for a complaint to withstand summary judgment, when the evidence shows that two major competitors (1) incompletely integrated their assets relating to a joint venture's business, and (2) restricted the venture's ability to price the venture's products in order to preserve each firm's own economic interests, with the result that prices inexplicably increased while venture costs were decreasing.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF THE AMICUS CURIAE	1
STATEMENT	1
SUMMARY OF ARGUMENT	7
ARGUMENT	8
A. *Copperweld* Should Not Apply to Joint Ventures Where the Parties Can Control Venture Operations in Their Own Independent Self-Interest	10
B. Direct Evidence of Anticompetitive Harm Is Sufficient to Warrant a "Quick Look" and Demand a Procompetitive Justification from Defendants, Without the Need to Precisely Define Relevant Markets	23
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 6, 19, 24

Associated Press v. United States, 326 U.S. 1 (1945) 13

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 28

Board of Trade of Chicago v. United States, 246 U.S. 231 (1918) 20, 24

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 14, 19

California Dental Ass'n v. FTC, 526 U.S. 756 (1999) ..... *passim*

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) 12

Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 5

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) ..... *passim*

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) 28

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 25, 26

Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003) 15

General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984) 19, 21

NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) 5, 20, 25, 26, 28

TABLE OF AUTHORITIES – Continued

Page

Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005) 24

R. v. Clarke Transport Canada Inc., 130 D.L.R. (4th) 500 (1995) 25

State Oil Co. v. Khan, 522 U.S. 3 (1997) 26

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 16

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified & aff'd*, 175 U.S. 211 (1899) 10

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001) 24

United States v. Sealy, Inc., 388 U.S. 350 (1967) 14

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 13, 14, 25

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 21

Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982) 11, 23

STATUTES

15 U.S.C. § 1 ..... *passim*

15 U.S.C. § 18 29

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Armen A. Alchian & Harold Demsetz, *Production, Information Costs and Economic Organization*, 62 Am. Econ. Rev. 777 (1972) 12

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Paradox Revisited: Interview with Judge Robert H. Bork, 3 Antitrust 16 (Summer 1989) 20

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Presley L. Warner & Michael J. Trebilcock, *Rethinking Price-Fixing Law*, 38 McGill L.J. 679 (1993) 25

STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

The American Antitrust Institute (AAI) is an independent, not-for-profit organization whose mission is to increase the role of competition and sustain the vitality of the antitrust laws. This filing has been authorized by a majority of the directors of the AAI (Albert H. Foer, Esq. and Professor Robert Lande of the University of Baltimore Law School). The Advisory Board of the AAI consists of more than 85 prominent lawyers, law professors, economists and business leaders (listed on the AAI web site: www.antitrustinstitute.org). The Advisory Board serves in a consultative capacity and their individual views may differ from the positions taken by AAI.

A decision that joint ventures are not subject to vigorous antitrust scrutiny could seriously undermine a competitive economy and deny consumers the benefits of competition. Ensuring that well-settled principles of antitrust law remain applicable to joint ventures is essential to vital antitrust enforcement.

STATEMENT

In 1998, two of the major oil companies competing in the western United States[2] began to sell their Shell- and

[1] This brief was not authored in whole or in part by any counsel for a party and no persons or entities other than The American Antitrust Institute made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been lodged with the Clerk.

[2] The complaint alleged a nationwide conspiracy, with similar facts challenging Shell- and Texaco-brand pricing in the eastern United

(Continued on following page)

Texaco-brand gasoline through a new business entity named Equilon. Foregoing an outright acquisition of assets by either one of the firms, or the creation of a new corporation that would operate their assets to compete efficiently as a wholly integrated economic unit, the parties chose instead to structure Equilon as a joint venture. Although the agreement provided that Shell and Texaco would each take a fixed percentage of Equilon's profits, the parties continued to compete with each other in geographic markets outside of the United States and in the sale of marine and jet fuel in the United States. The agreement could also be terminated at any time by mutual consent or by either party after five years. Of particular significance, the parties entered into a Brand Management Protocol that required Equilon to preserve the Shell and Texaco brands, to treat each brand equally, and to provide neither brand with preferential treatment. This Protocol makes little business sense if the parties anticipated a permanent end to all competition in the relevant market. In short, the agreement called for the suspension of competition, not the end of competition that necessarily arises from a merger or a similarly complete integration of economic activity.

Respondents developed evidence showing that major oil companies differentiate their products through additives and advertising creating brand loyalty, that Shell customers tended to be more affluent and urban while Texaco customers tended to be more blue collar and rural, and that the tankwagon price of Texaco-brand gasoline

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States by another joint venture named Motiva. To simplify the legal issues, we confine our discussion to the venture's purpose and effect in the western United States.

was generally two cents below other major brands, including Shell. Resp. Br. at 7. Moreover, discovery produced evidence suggesting that marketplace competition did not force Equilon to pass on to consumers the cost savings from jointly refining and distributing gasoline. Resp. Br. at 11-12. At the commencement of the venture, Equilon management maintained the traditional two cent price differential between Shell- and Texaco-brand gasoline, but after eight months, the "Members Committee" of Shell and Texaco officials that controlled Equilon adopted a "Strategic Marketing Initiative" directing Equilon management to charge identical prices in each geographic market for Shell- and Texaco-brand products. (Evidence suggests that Shell and Texaco officials had deliberately refrained from discussing brand pricing prior to the formation of the venture "because of anti-trust concerns." Resp. Br. at 9.) Of greatest significance, Respondents offered evidence that Equilon sharply raised the price of its gasoline, at a time when crude oil prices were stable or declining. Resp. Br. at 11. In particular, Respondents noted significant price increases in West Coast markets where Equilon had large market shares. *Id.*

In their brief, Respondents appear to present alternative theories as to how Shell and Texaco have restrained trade and thus harmed consumers. One theory is that, to preserve each brand in the foreseeable event (which actually occurred three years later) that the venture would be terminated, Shell and Texaco directly and without justification restrained Equilon's ability to compete by insisting on a single price for both brands of gasoline, even if it was in Equilon's interest to pursue a strategy of brand differentiation. A second theory is that in those markets where the combined retail market share of Shell and

Texaco was particularly large, Equilon was able to increase prices dramatically at a time of stable input costs and reduced operating costs, suggesting that Equilon was able to harm consumers through either the use of unilateral market power or coordinated interaction with other major oil companies. The direct evidence produced in discovery supports both these theories, and it is not necessary at this stage of the case to determine which, if either, is correct.

Although we do not endorse all of its reasoning, in our view the court of appeals correctly determined that Respondents' complaint should not have been summarily dismissed. The district court concluded that because the agreement forming Equilon was not a naked restraint of trade, but represented a genuine integration of economic activity that resulted in demonstrable efficiencies, the rule of reason provided the only basis for condemning any agreements by the parties that related to Equilon. This conclusion was erroneous. Because this Court has directed that horizontal restraints require "an enquiry meet for the case" (*California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999)), we believe that Respondents' case should have been allowed to proceed as a "quick look" without the need for a precise definition of relevant markets, or a broad conclusion that only a full-blown rule of reason allegation could support the complaint.

Although their joint venture did reflect a genuine integration of many productive assets, Equilon was not a complete integration of all economic activity within the market. If, as evidence in the record suggests, Shell and Texaco structured Equilon to preserve their independent interests in a manner unnecessary to achieve the legitimate fruits of the venture, this unduly restrictive structure can

be condemned under *California Dental* and other Supreme Court precedents without a complete examination of market effects. Moreover, even if Equilon were not structured in an unnecessarily restrictive way, this Court has made it clear that an agreement can be condemned under a "quick look," without precisely defining relevant markets under a full-blown rule of reason, where the plaintiff introduces direct evidence of intent to raise prices and that in fact this intent was achieved. *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 109-10 & n.42 (1984).

At the same time, the court of appeals erred in requiring that all pricing decisions to which a joint venture's principals agree must be separately justified as necessary to achieve the efficiencies that the venture is intended to create. Because the appropriate standard of antitrust analysis under Section 1 of the Sherman Act (15 U.S.C. § 1) should turn on real economic effects rather than "upon formalistic line drawing" (*Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977)), a joint venture should be treated as a single firm for purposes of Section 1 only when there is a complete unity of economic interest among those controlling the venture – *i.e.*, their sole economic interest is in maximizing the competitive ability and profitability of the venture-as-a-whole. Of course, even in such a case, the *formation* of the joint venture is subject to antitrust challenge, and evidence that the venture in fact resulted in unexplained increases in prices suffices to demonstrate an unreasonable restraint of trade.

On remand, Respondents should be given an opportunity to prove that Shell and Texaco created the Brand Management Protocol, required Equilon to treat both brands equally, and adopted the single-price strategy,

contrary to Equilon's interests as an independent competitor. Respondents plausibly suggest that this restraint was motivated to protect each brand in ongoing competition in the sale of jet and marine fuel, to preserve a marketing position in the event that the venture is terminated (on two years notice by either party, or by mutual consent, which did occur three years after Equilon's formation), or to facilitate some more immediate exploitation of consumers. Absent a persuasive, legitimate justification for this arrangement, a reasonable jury could find that Petitioners were more concerned with maintaining the relative strength of their branded gasoline than on profitably and vigorously competing in the automobile gasoline market. Ordinarily, firms ending all competition in a relevant market, and seeking only to profit as "shareholders," would allow the executives in the venture in which they had invested to compete in whatever way best advances the competitive interests of the venture-as-a-whole. Restraining Equilon here suggests, absent some legitimate explanation, that Shell and Texaco were not seeking to create a more efficient competitor in a competitive marketplace, but to profit by lessening competition between the two former rivals, who might again be marketplace foes in the future. Because "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets" (*California Dental*, 526 U.S. at 770), the court of appeals correctly held that the district court erred in granting summary judgment to the defendant. Indeed, if Petitioners provide absolutely no justification for unnecessary price fixing, the price agreement should be condemned as illegal *per se*. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351-355 (1982).

An alternative ground for affirmance is also apparent, because Petitioners acknowledge that the initial agreement between Shell and Texaco to form Equilon is an agreement between competitors subject to Section 1. For purposes of summary judgment, Respondents have offered sufficient evidence of anticompetitive effect to justify "quick look" condemnation, absent evidence from Shell and Texaco to justify their agreement. Equilon's apparent ability to raise the price of Texaco-brand gasoline without marketplace retribution, and then to continue to raise the price of both brands significantly, at a time when crude oil prices remained stable or declined and venture costs were reduced due to operating efficiencies, suggests that their strategy was designed to signal price coordination to its major rivals. This evidence of unexplained price hikes obviates the need for a precise delineation of relevant product and geographic markets.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the district court should not have summarily dismissed Respondents' antitrust challenge to an anticompetitive pricing scheme derived from the overly restrictive structure of Petitioners' joint venture, especially where record evidence demonstrated actual anticompetitive effect. Contrary to the assertions by Petitioners and their allies, this case does not involve the pricing decisions of a fully integrated joint venture. Rather, the joint venture was designed to maintain the competitive strength of each firm's brand, even if contrary to the best interests of the venture-as-a-whole. Accordingly, this Court's holding in *Copperweld* that Section 1 of the Sherman Act does not apply to intrafirm

agreements has no application to this case. A full-blown rule of reason is not required if, on remand, Respondents can persuade a jury that the challenged pricing strategy was unrelated to the legitimate purposes of the venture and caused anticompetitive harm.

Alternatively, the court of appeals' judgment should be sustained because Respondents introduced evidence that the elimination of competition between Shell and Texaco did in fact raise prices at a time of stable or declining costs. Under this Court's precedents, such evidence is sufficient to demonstrate a violation of Section 1, even in the absence of evidence that Petitioners exercised market power in precisely defined economic markets.

ARGUMENT

Respondents' challenge to the Shell-Texaco joint venture includes evidence that the parties agreed prior to the formation of the Equilon venture that, although overall profits would be shared according to a fixed formula, Equilon would be restrained from pricing Shell-and Texaco-brand products in a manner that might well increase Equilon's profitability. Specifically, Respondents assert that the Brand Management Protocol, requiring that Equilon treat the Shell and Texaco brands equally, was imposed to preserve the principals' overriding concern with "brand management," *i.e.*, the maintenance of the relative strength and consumer appeal of the Shell and Texaco brands. Pursuant to this protocol, absent mutual agreement by Shell and Texaco, even if Equilon determined that its profits could be enhanced by a strategy that emphasized one brand or the other (a common strategy

among multibrand corporations), it was literally restrained from pursuing such a strategy. Petitioners provided no plausible efficiency justification for this restraint.

Two features distinguish joint ventures and mergers from cartels: increased efficiency resulting from economic integration, and business conduct designed to maximize competitive advantage for the venture-as-a-whole, rather than the individual self-interest of co-conspirators. Where a joint venture agreement does not create a "unity of interest" between the parties, but rather is designed to protect the parties' distinct interests (either in other markets or with regard to reentering the market in question), a plaintiff challenging a demonstrably overbroad and unnecessary restraint should not be required to prove its case under the rule of reason. Such a burden would significantly impede the nuanced approach adopted by this Court to prevent joint venture firms from cooperating in ways that yield no economies that will redound to the benefit of consumers.

Even if an antitrust court's inquiry focused on Petitioners' agreement to form Equilon itself as a means to fix prices, rather than the specific decision to charge identical prices, Respondents have presented sufficient evidence of anticompetitive effect to avoid summary dismissal of their claim. As this Court's precedents make clear, direct evidence of higher prices suffices to find an unreasonable restraint of trade absent justification or refutation by the defendant, even if the plaintiff fails to demonstrate the defendant's market power in a precisely defined economically relevant market.

A. *Copperweld* Should Not Apply to Joint Ventures Where the Parties Can Control Venture Operations in Their Own Independent Self-Interest

In *Addyston Pipe*, this Court affirmed a now-landmark decision by then-Judge William Howard Taft finding that a detailed price-fixing conspiracy was illegal under the Sherman Act, "however great the competition they had to encounter." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 291 (6th Cir. 1898), *modified & aff'd*, 175 U.S. 211 (1899). Yet shortly thereafter, the defendants merged all business operations to form the U.S. Cast Iron & Foundry Co., apparently without objection from the same Justice Department that had prosecuted them. The tolerance of a merger while condemning price fixing illustrates a key insight, recognized by this Court years later in *Copperweld*: a complete integration of all economic activity is unlikely to be anticompetitive absent some demonstration of adverse market effects, because the newly merged venture is presumed to perform as an efficient unit, taking formerly disparate parts and thereafter acting in the best interest of the entity as a whole. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). In this case, had Equilon been structured as a complete integration, a claim that the integration was unnecessary to achieve efficiencies, or that the efficiencies were outweighed by the simultaneous increase in market power resulting from the cessation of competition between Shell and Texaco, may well require proof of actual anticompetitive effect. (As we contend in Part B, *infra*, the record provides sufficient proof of actual anticompetitive effect to withstand Petitioners' motions for summary judgment.) This Court need not reach the issue of whether *Copperweld* should be extended to fully integrated,

efficiency-enhancing joint ventures; this case, rather, involves a partially integrated joint venture with unjustified and unnecessary pricing restraints.

Intrafirm agreements by a wholly integrated economic unit are not closely scrutinized by courts under either antitrust or corporate law, because the law presumes that in competitive markets the firm's managers will look out for the unit-as-a-whole and the result will be vigorous rivalry. When rivals wholly integrate their economic activity, the integration will often be procompetitive; where the integration simultaneously increases market power and results in efficiencies, only an inquiry into actual competitive effects can determine if this is so. In contrast, when rivals with independent interests combine in ways that are demonstrably unnecessary for any legitimate activity, it is reasonable to presume – even absent reliable evidence about market definition – that the parties themselves recognize that market retribution will not be swift should they seek to use their cessation of competition to exploit consumers. *Cf. Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.) ("A firm that has no market power is unlikely to adopt policies that disserve its consumers; it cannot afford to. And if it blunders and does adopt such a policy, market retribution will be swift.").

Moreover, when there is a complete integration of economic activity, absent judicial micromanagement, there is no effective antitrust remedy other than dissolution of the venture. In contrast, unnecessary price agreements that arise in the context of partially integrated ventures can be enjoined by the court while the unchallenged and legitimate aspects of the venture proceed unfettered.

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

Extending *Copperweld* to this joint venture is unwarranted not only because of the potential to exercise market power, but also because the venture's founders, acting in their own self-interest, inhibited the joint venture's ability to compete effectively and efficiently with others. *Cf.* Joseph F. Brodley, *Joint Ventures and Antitrust Policy,* 95 Harv. L. Rev. 1521 (1982) (in contrast to a merger, joint ventures create a problem of two masters). In any partnership where the payoffs to decisions are shared, economists have observed that the marginal benefit to each partner accruing through the arrangement is smaller than the total benefit, and therefore no partner has the incentive to act in ways which maximize total payoffs. The most efficient allocation of resources requires the services of a "residual claimant," a separate economic actor who has the incentive to make optimal decisions, make whatever side payments are necessary to achieve the desired result, and then retain the surplus. *See, e.g.*, Bengt Holmstrom, *Moral Hazard in Teams,* 13 Bell J. Econ. 324 (1982); Armen A. Alchian & Harold Demsetz, *Production, Information Costs and Economic Organization,* 62 Am. Econ. Rev. 777 (1972). Here, if Shell had purchased Texaco outright, then Shell would be the residual claimant. As the venture was in fact structured, however, there was no entity with the incentive to behave efficiently.[3]

[3] An Equilon strategy that benefitted the Shell brand at the expense of the Texaco brand might still be pursued, but only if Shell and Texaco could agree on side payments to make them both better off; the above-cited economic literature suggests that transactions costs will

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This Court has consistently held that joint ventures structured so that individual self-interest prevails over the interests of the venture-as-a-whole are suspect under the Sherman Act. In *Associated Press*, this Court struck down a bylaw allowing local newspapers to veto admission of their competitors into a news-gathering joint venture. *Associated Press v. United States,* 326 U.S. 1 (1945). Certainly, the venture-as-a-whole would have been enhanced with the admission of a second news-gathering source in major cities. Yet each party, looking out for its own individual self-interest, preferred the modest reduction in the quality and breadth of AP news to the risk that a direct rival might benefit by access to the venture's output.[4]

A similar local veto was struck down in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). The lone dissent objected to the close scrutiny given to the joint venture's arrangement, arguing that there was no difference between the challenged territorial restrictions among rivals cooperatively owning trademarked goods for sale, and the perfectly lawful decision by a single firm operating grocery stores (such as the A&P chain) deciding where to locate its stores. *Id.* at 623 n.11 (Burger, C.J., dissenting).

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often prevent the efficient result from occurring without a residual claimant.

[4] To be sure, the parties might claim that the restriction was reasonably necessary to avoid free-riding and to secure and maintain the membership of important contributors. This is precisely the sort of justification that courts should consider under Section 1. Extending *Copperweld* to *Associated Press* would eliminate scrutiny of whether the parties' justification was valid. Here, of course, the record provides no serious claim that tying Equilon's hands through the Brand Management Protocol had any legitimate justification.

Although *Topco*'s summary refusal to allow the defendant *any* opportunity to justify its arrangement has attracted widespread criticism, and may not reflect this Court's approach after *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), the majority was correct in failing to accept the dissent's reasoning. To illustrate, suppose that A&P operated a store in Michigan City, Indiana, and an analysis showed that opening a new outlet in nearby Long Beach could drain between $25,000 and $75,000 annually in operating profits from the existing store; nonetheless, A&P would surely proceed with the new store if it estimated that the new store would recoup over $100,000 in profits. On the other hand, a Topco member operating a Michigan City store would not consent to allowing a rival to open a store in Long Beach, absent a side payment, and the parties may well have considerable difficulty in agreeing upon such a payment.

The decision in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), demonstrates this Court's sensitivity to the structure of a joint venture. The defendant company licensed a popular trademark for mattresses and imposed territorial restrictions on licensees. The defendant claimed that the agreement was a vertical agreement; this Court rejected this claim, noting that the licensees controlled the decision and that the territorial restrictions furthered their self-interest in manufacturing mattresses without competition from their fellow venturers. Because "Sealy, Inc., is an instrumentality of the licensees," rather than functioning as the "principal," the arrangement was condemned as illegal *per se*. *Id.* at 354, 357-58.

A distinction between a structure promoting the distinct interests of separate principals and promoting the venture-as-a-whole was again recognized by this Court in

Copperweld. Indeed, Petitioners seem to accept this distinction, in emphasizing repeatedly and correctly one important and (in this context) procompetitive aspect of Equilon's structure: that Shell and Texaco receive revenues based on a percentage of Equilon's operating profits, rather than based on profits or sales of Shell- or Texaco-branded gasoline. Texaco Br. at 4. The implication of this assertion is clear: if Equilon had been created with joint price-setting by Shell and Texaco, but a structure whereby accountants would allocate profits to Shell based on the sale of Shell-brand products and to Texaco based on Texaco-brand sales, *Copperweld* would be inapplicable even though the venture reflected a complete integration of physical and trademark assets expected to create significant efficiencies.

Similarly, Respondents have produced sufficient evidence for a reasonable jury to find – contrary to Petitioners' claims – that the parties *did not* establish a joint venture that reflected a complete integration of all economic activity within the western United States, notwithstanding the profit-sharing agreement. Respondents' evidence shows that this is decidedly *not* the equivalent of what would have occurred had a new corporation, Equilon, purchased all relevant assets from both Shell and Texaco, or if one of the parties had acquired all the assets from the other. In none of these scenarios would Equilon's management have had to labor under a protocol requiring equal treatment of branded products. Instead, they would have had a fiduciary duty to price Equilon products to maximize competitive advantage for the newly formed entity. *Cf. Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 (9th Cir.) (Kozinski, J.) (lack of fiduciary duty suggests that venture is not a single entity under

Copperweld), *cert. denied*, 540 U.S. 940 (2003). Any pricing decisions freely made by Equilon management would raise competitive problems only if the elimination of competition between Shell and Texaco produced adverse marketplace effects, presumably through coordinated interaction among remaining sellers or unilateral market power, and could sensibly be enjoined only by dissolving the venture. In contrast, the Brand Management Protocol can be stricken as illegal while the procompetitive aspects of the venture can proceed.[5]

In short, this is not a challenge to the "right of a legitimate joint venture to set the selling price of *its own products*" (Texaco Br. at 1 (emphasis added)), but to the decision of the principals to restrain a legitimate joint venture's ability to compete in the market. Respondents allege that Shell and Texaco structured Equilon in a manner that required the venture to protect both brands, regardless of market conditions or whether such a protocol would benefit consumers or Equilon as a distinct and separate entity. If the parties were simply "shareholders" in Equilon (Texaco Br. at 3, 13), why would they have insisted on the Brand Management Protocol requiring Shell and Texaco brands to be treated equally? Why wouldn't each shareholder want Equilon to price in a manner that results in the greatest short-term profit or long-term competitive advantage for Equilon? Given the traditional product differentiation between the two

[5] The fact that Shell, Texaco, or both might not have agreed to enter into the joint venture without the additional carrot of an anti-competitive and unnecessary price-fixing agreement cannot justify the agreement. Otherwise, joint ventures truly would become covers for price fixing. *Cf. Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951).

brands, with Shell preferred by more urban and affluent consumers, one would expect that Equilon's managers would be given the discretion to select a pricing scheme most likely to advance Equilon's interests, because overall profits are shared on a fixed basis by Shell and Texaco. The unexplained insistence on treating brands equally is difficult to understand if, as Petitioners and their allies maintain, the agreement ended all competition between Shell and Texaco in the western United States and had no effect on their rivalry in other markets.

Because the record provides no legitimate reason for this decision, a reasonable jury could infer that Equilon's ability to compete would not have been restrained *unless* this limitation had some effect in other markets. Each party may have feared that relative success of the other brand in gasoline markets would affect its continued rivalry in markets for marine or airport fuel. An aggressive pricing strategy by Equilon management in the western United States – perhaps to take advantage of the significant cost savings realized by the merger – could invite retaliation against Shell and/or Texaco in foreign markets. Recognizing the impermanency of the venture, each party may have resisted the temptation to maximize Equilon profits through innovative brand pricing, preferring the safety of brand maintenance in the event of resumption of competition between the two parties should the venture be terminated. The point at this stage of the litigation is not whether any of the foregoing theories accurately describe market realities; rather, if the parties fail to plead and offer some proof of a legitimate justification, since Respondents have come forward with a plausible theory of competitive harm, the jury is entitled to find that the agreement can have no function other than to

harm competition. If a jury could so find, then the assertion that "neither Shell nor Texaco had a specific interest in the price charged for any particular brand sold by the ventures" (Texaco Br. at 4), is simply inaccurate.

This Court need not determine the purpose of the challenged provision of the Brand Management Protocol at this stage of the proceedings. It is sufficient for Respondents to demonstrate, as they have done, that there is a significant possibility that the agreement was not imposed by Shell and Texaco simply as shareholders in Equilon, but rather to pursue their own interests outside of the venture. Petitioners seek to contrast the formation of the venture, concededly subject to Section 1 scrutiny, with post-formation internal decisions about the manner in which the venture operates. However, the thrust of Respondents' challenge to the Brand Management Protocol goes to the preformation structure, not to post-formation operation. Respondents allege that, prior to formation, Shell and Texaco agreed that Equilon would not, post-formation, adopt a potentially profit-maximizing strategy if it resulted in a preference for one brand over the other. Thus, the legality of the Brand Management Protocol is a legitimate object of antitrust scrutiny under Section 1 as an agreement among competitors.[6]

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[6] Petitioners and their allies incorrectly characterize Respondents' lawsuit as simply a challenge to post-formation decisions. Their implication that the FTC's consent decree immunizes any agreements Shell and Texaco may have made (*see, e.g.*, Texaco Br. at 25 (dismissing concerns as already "accounted for in evaluating the venture's formation and structure"); Visa U.S.A. et al. Br. at 4 (FTC and state attorney general review "resolved the issue of Equilon's legality")), is wrong legally as well as factually.

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It is critical that antitrust scrutiny of joint ventures adhere to Judge Richard Posner's observation that it "does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition." *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984). Application of this Court's precedents fulfill that promise, and suggest that summary judgment is not appropriate in this case. When price fixing is an "obvious necessity" in order to produce a joint product, *Broadcast Music* holds that the normal condemnation of such conduct as *per se* illegal is inappropriate. By the same token, when it is clear that the challenged price fixing is not necessary to accomplish the venture's legitimate purposes, *Maricopa* holds that the price fixing is condemned as illegal *per se*. If the record on remand

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As a legal matter, it is clear that private parties are not bound by FTC decisions and are free to file a private lawsuit under Section 1 to challenge a venture's structure. Gov't Br. at 16 n.10. The principal thrust of our argument is that blatantly anticompetitive and unjustified aspects of a venture's structure can be condemned under the antitrust law without a full rule of reason analysis requiring the precise definition of relevant markets or proving actual adverse effects on competition. (We argue in Part B, *infra*, that Respondents have in fact provided sufficient evidence of the latter.) The competition policy question of whether private suits under Section 1 should be allowed to challenge business practices like the formation of integrated joint ventures, or whether such suits must be brought prior to the commencement of joint operations, is best addressed to Congress or the Antitrust Modernization Commission, not this Court.

Moreover, as a factual matter, there is no evidence that the FTC in fact scrutinized and approved the portion of the agreement that required Equilon to set prices in order to protect the Shell and Texaco brands. Rather, the FTC analyzed the venture as if it were a complete merger between firms previously competing in various local markets.

includes disputed evidence regarding the necessity for price fixing in the context of a partially integrated joint venture, then, as in *NCAA*, 468 U.S. at 110 n.42, a closer but more focused inquiry is appropriate, but not necessarily the full economic record required under the full-blown rule of reason contemplated by *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). As Robert Bork has observed, "if you have an actual integration in some sense but the restraint is broader than anything that the integration would justify, to that extent it is a naked restraint. You shouldn't put up with it." *Paradox Revisited: Interview with Judge Robert H. Bork*, 3 Antitrust 16, 18 (Summer 1989).

We agree with Petitioners that if the undisputed facts had demonstrated that their agreement reflected a complete integration of all joint venture business activity in the relevant market, or if they had demonstrated that identical-brand pricing was reasonably necessary to allow Equilon to operate, then antitrust liability should only attach on proof that the actual anticompetitive effect of the venture outweighed its procompetitive benefits.[7]

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[7] The only justification put forth by the parties for their mandate to set identical prices for Shell- and Texaco-brand products was to avoid liability for price discrimination under the Robinson-Patman Act. Whether there are disputed facts to suggest this is unnecessary or pretextual is best left for the district court on remand. We note, however, that conformance with the Robinson-Patman Act does not require a broad promise to treat both brands equally as the Brand Management Protocol requires. Moreover, although Shell and Texaco obviously have a keen interest in ensuring that their Equilon venture not incur liability for illegal activity, we doubt that the principals specified in their agreement every single aspect of law to which Equilon's managers need comply. On remand, the district court might legitimately explore why Equilon's management could not be trusted to ensure that it complied with antitrust laws in its ongoing operations,

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Likewise, Respondents' claim that identical-brand pricing was anticompetitive because the elimination of interbrand competition between Shell and Texaco allowed Equilon to increase prices through the exercise of unilateral market power or by coordinating with major rivals should require proof of actual anticompetitive effect. But that does not justify summary dismissal here: the facts show neither a complete integration nor the necessity of identical-brand pricing, and, as we claim in Part B, *infra*, Respondents have presented sufficient evidence of actual anticompetitive effect.

The United States' argument reaches much too far in suggesting that any agreement among competitors that integrates economic activity is immune from *per se* analysis no matter how unnecessary its restrictions are. This would be inconsistent with this Court's approach in *Copperweld*, as further explicated by Judge Posner in *General Leaseways*. Both these decisions suggest the continuing need for antitrust scrutiny where venturers retain the ability to restrain the venture to promote individual self-interest. Moreover, to require a plaintiff challenging a demonstrably overbroad restraint to delineate precisely a relevant market under a full-blown rule of reason will significantly impede the careful and surgical use of this Court's nuanced approach, inappropriately

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and, if Robinson-Patman compliance was so apparent, why it took the parties eight months to realize this. In any event, this Court has cautioned that price fixing that is otherwise illegal under the Sherman Act cannot be justified as an effective means of limiting liability under the Robinson-Patman Act. *United States v. United States Gypsum Co.*, 438 U.S. 422, 458-59 (1978).

allowing firms with a cooperative relationship to agree in ways that yield no economies.[8]

The FTC's consent decree with regard to Equilon's formation does not obviate the need for antitrust scrutiny of the challenged price agreement. There is no record evidence that the FTC was informed that Equilon's ability to compete in the gasoline market against several established rivals would be restrained by the parties' Brand Management Protocol.[9] Moreover, the fact that the Commission chose to settle rather than challenge in its entirety the creation of a venture with demonstrated efficiencies in refining and wholesale distribution (the parties failed to cite any efficiencies related to the joint operation of retail outlets), falls far short of meeting Judge Posner's sound test for the absence of market power: that firms facing vigorous rivalry will be unlikely to harm consumers, and, if they do, "market retribution will be

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[8] It is surprising that the Government seems to view joint venture analysis *entirely* from the lens of merger analysis. For example, in discussing Professor Areeda's famous illustration of the rule of reason in a "twinkling of an eye," a hypothetical sales joint venture between Ford and General Motors, the Government correctly observes that the *formation* of the venture was obviously anticompetitive, but then assumes that the FTC's review of the creation of Equilon precludes a conclusion that an undisclosed interpretation of the Brand Management Protocol to promote the independent interests of Shell and Texaco is now beyond antitrust scrutiny. Determining, under a merger analysis, whether a proposed business arrangement will result in coordinated interaction or market power is complex enough. Surely the Government should want the flexibility to challenge blatantly anticompetitive structural aspects of joint ventures without the need to meet the burden of proof required by the Merger Guidelines.

[9] *See* Texaco Br. at 4 (FTC evaluated the agreement as a complete merger on the assumption that the venture would operate as a single entity).

swift." *Valley Liquors*, 678 F.2d at 745. Of far greater significance, even if the FTC had definitively determined that, using all the expertise at its disposal, it was unable *ex ante* to demonstrate a probable anticompetitive effect, this cannot insulate an agreement where Petitioners have established, *ex post*, actual evidence of increased prices of the sort that economic theory suggests can only occur from the significant lessening of competition that the antitrust laws prohibit.

B. Direct Evidence of Anticompetitive Harm Is Sufficient to Warrant a "Quick Look" and Demand a Procompetitive Justification from Defendants, Without the Need to Precisely Define Relevant Markets

As Dean Pitofsky, Professor Goldschmid, and Judge Wood observe in their leading antitrust casebook, in "theory and practice, relevant market definition is as difficult an undertaking as any in antitrust." Robert Pitofsky et al., *Cases and Materials on Trade Regulation* 185 (5th ed. 2003). This insight is critical to the continuing evolution of the appropriate means of antitrust review for agreements among competitors. As stated in *California Dental*, 526 U.S. at 781, what is required is an "enquiry meet for the case." Petitioners and their allies devote virtually their entire argument to the question whether their conduct is illegal *per se*, *i.e.*, conduct so blatantly anticompetitive that it will be summarily condemned without any opportunity for consideration of justifications or market effect. They do so in the hopes that a reversal from this Court will require Respondents here, and anyone else challenging demonstrably overbroad or unjustified aspects of legitimate joint ventures, to embark upon the

difficult (and, in light of modern litigation costs, expensive) task of considering all relevant evidence under a full-blown rule of reason. *Cf. Board of Trade of Chicago*, 246 U.S. at 238.

However, as Chief Judge Douglas H. Ginsburg recently observed, this Court's approach "has gone through a transition over the last twenty-five years, from a dichotomous categorical approach to a more nuanced and case-specific inquiry." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 33-34 (D.C. Cir. 2005). This more nuanced approach properly reflects the difficulty of proof in a rule of reason case. As the former General Counsel of the Federal Trade Commission insightfully observes, litigating this case under the rule of reason would be a "defendants' paradise." Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 Antitrust L.J. 495, 521 (2000).

A quicker look at suspect agreements, in lieu of a "more sedulous one" (*California Dental*, 526 U.S. at 781), not only promotes business certainty and litigation efficiency (*Maricopa*, 457 U.S. at 343-44), but also can serve in some cases to eliminate rather than create error costs. To be sure, the risk of a "false positive" – a holding striking down a restraint using a *per se* or "quick look" approach when in fact the agreement did not harm competition – often counsels in favor of a more complete inquiry into actual effects. However, this Court's "nuanced" approach should be maintained to avoid the risk of a "false negative" – where the plaintiff's inability to demonstrate market power to the satisfaction of the trial judge exonerates clearly anticompetitive behavior of the sort that would be unlikely to be effective in the absence of such power. *Cf. United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.)

(affirming district court's conclusion that Microsoft possessed monopoly power because, *inter alia*, its conduct would make little sense if Microsoft faced significant rivals), *cert. denied*, 534 U.S. 952 (2001); Willard F. Mueller, *The* Sealy *Restraints: Restrictions on Free Riding or Output?* 1989 Wisc. L. Rev. 1255, 1267 n.74 (1989) (order on remand in *Topco* enjoining overbroad restraints but permitting more narrowly tailored restrictions permitted Topco to grow by 74% from 1967-85).[10]

This Court has repeatedly held that a price increase is the "hallmark" of an antitrust violation (*NCAA*, 468 U.S. at 113), and that direct evidence of price increases suffices to demonstrate an unreasonable restraint of trade, without the need for precise market definition (*FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986); *NCAA*, 468 U.S. at 110 n.42). Indeed, this Court expressly endorsed the Solicitor General's view that if a plaintiff provides direct evidence of price distortions, there is "'no need for the respondents to establish monopoly power in

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[10] The problem with false negatives has been recognized by commentators in Canada, where the relevant competition statute does not allow anything short of a "more sedulous" determination that those accused of a conspiracy to restrain trade have the power to "lessen competition unduly." For example, in *R. v. Clarke Transport Canada Inc.*, 130 D.L.R. (4th) 500 (1995), the government established a 21-year conspiracy to fix prices among railroad freight forwarders, including boycotts of noncooperating forwarders. Yet the defendants were acquitted at trial because the judge concluded that the relevant market included freight trucks. The judge did not explain why the defendants would spend over two decades conspiring if any effort to secure supra-competitive prices would be checked by competition from truckers. The problem with this sort of false negative is among the reasons why Canadian experts have advocated legislation creating some form of *per se* illegality. *See, e.g.*, Presley L. Warner & Michael J. Trebilcock, *Rethinking Price-Fixing Law*, 38 McGill L.J. 679, 690-92 (1993).

any precisely defined market . . . in order to prove the restraint unreasonable.'" *NCAA*, 468 U.S. at 110 n.42.

In opposing Petitioners' motions for summary judgment before the district court, Respondents presented credible evidence of significant price increases at a time when input prices were low and when operating costs were being reduced through efficiencies. The evidence also shows that Shell and Texaco executives appreciated the potential for Equilon to exercise price leadership through the single-price strategy. Resp. Br. at 9. The representations by Respondents' counsel that they wished to proceed under a "quick look," and not under the rule of reason, is best understood as foregoing proof of anticompetitive harm by defining relevant markets. To suggest that this sort of record warrants summary dismissal because Respondents failed to precisely define markets is to suggest that the complaints in *Indiana Federation of Dentists* or *NCAA* should have been likewise dismissed prior to trial, when in fact this Court found the defendants liable in both cases.

The sparse record here illustrates why the Solicitor General was correct in *NCAA* and why this Court properly endorsed his view that direct effects obviate the complexity of market definition. As this Court recognized in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), retail gasoline markets are often highly localized. A reasonable jury could infer that if the relevant market were vigorously competitive, Equilon would not have been able to raise the price of Texaco-brand gasoline without losing money to other rivals unless they were engaged in price coordination, and that the "single price" strategy was an effective tool that

Equilon used to signal a desire to coordinate prices at a higher level.[11]

Reviewing a proposed venture *ex ante*, the FTC must make its best estimate as to the location of firms whose competition can prevent the parties from imposing a small but significant price increase on consumers, and having done so, whether conditions will permit the remaining firms to engage in price coordination. Where, as here, the matter was settled by consent decree, the FTC must make a further prediction that the required asset divestitures will frustrate any efforts by the parties or other major rivals in the market to coordinate their prices. Presumably, the FTC made each of these predictions here in permitting Equilon to go forward. The *ex ante* prediction that rivalry from other firms would prevent any consumer exploitation is, however, inconsistent with the *post hoc* record evidence that Equilon did *not* feel constrained to pass on cost savings to consumers, or with the record evidence of significant price increases in light of stable input prices. Of course, Petitioners are free to challenge Respondents' evidence as unreliable or inaccurate. That is what trials are for.

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Petitioners and their allies repeatedly emphasize that Equilon's profits are distributed on a percentage basis, not based on the economic performance of specific brands. Implicit in this argument is the recognition that if Equilon's profits were distributed to each party based on

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[11] Alternatively, the jury might infer that because of the specific preferences of Shell and Texaco consumers or their large market share in localized markets, Equilon was able to raise the Texaco prices and then the prices of both brands, notwithstanding reduced operating costs and stable crude oil prices, because of unilateral market power.

performance of their own brands, the venture would likely have faced an antitrust challenge. A holding from this Court that Respondents' claims should not be summarily dismissed will simply reinforce the current legal environment where (1) naked restraints are summarily condemned, (2) complete economic integrations are examined under merger standards, and (3) partial economic integrations are examined under the spectrum of standards recognized by *NCAA* and *California Dental* that this Court has employed in interpreting Section 1 of the Sherman Act. A judgment of affirmance will not second-guess a wholly integrated business entity's unrestrained decision on the price to sell "its" products. Proof of anticompetitive effect will still be required for partially integrated joint ventures when it appears that any restraint on the venture's independent discretion is reasonably related to the parties' legitimate interests. The question is not antitrust review of "bad" management (*cf.* Gov't Br. at 28), but management restrained by two rivals who may have sought to preserve their competitive position for future market reentry, and whose joint decisions have demonstrably raised prices. And, of course, ultimately plaintiffs cannot collect a penny in actual damages for price fixing without proof that the challenged scheme actually caused higher prices. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 345 (1990).

This Court has unequivocally held that the appropriate standard of antitrust analysis under Section 1 should turn on "actual market realities" rather than "formalistic distinctions." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466-67 (1992). Where the actual economic effect of a joint venture is the same as that of a merger – the creation of a fully integrated business

entity operated to maximize overall profits for its owners – the form of the entity should not permit scrutiny beyond what Section 7 of the Clayton Act (15 U.S.C. § 18) requires for mergers. But what is sauce for the goose is good for the gander: where the parties form a joint venture but inexplicably restrain the venture's ability to profit, and economic theory plausibly explains such a restraint as facilitating the parties' ability to succeed in other markets or should they choose to resume competition with each other, than it would be an act of formalistic line drawing to bar the courts from the sort of analysis of overbroad horizontal restraints that they have engaged in from the early developments of the common law of restraint of trade.

CONCLUSION

The judgment of the Court of Appeals, reversing the district court's granting of Petitioners' motion for summary judgment, should be affirmed. Because Petitioners' argument seems largely premised on factual assertions that are disputed, or on a misunderstanding of Respondents' "waiver" of a full-blown rule of reason requiring precise delineation of relevant markets in favor of a "quick look" claim that includes direct evidence of actual economic impact, this Court may alternatively wish to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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TEXACO, INC., *Petitioner*

v.

FOUAD N. DAGHER, *et al.*

SHELL OIL COMPANY, *Petitioner*

v.

FOUAD N. DAGHER, *et al.*

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND FINANCIAL SERVICES ROUNDTABLE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the American Bankers Association, Consumer Bankers Association, and Financial Services Roundtable respectfully move this Court for leave to file the accompanying brief, as *amici curiae* in support of petitioners Texaco, Inc. and Shell Oil Company.

Letters from counsel for petitioners consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). Respondents have withheld consent.

This case involves a significant issue in antitrust law: whether the *per se* rule of liability should be applied to the ordinary business conduct of joint ventures that enhance economic efficiency. Financial services networks – *e.g.*, automated teller machine networks, credit card networks and debit card networks – are a critical part of our nation's economy. *Amici's* members, which comprise the vast majority of financial services companies in the United States, are participants in those networks, many of which are structured as joint ventures. *Amici* seek to bring to the Court's attention the potential cost that the court of appeals' decision, unless reversed, may impose on the efficient operation of our nation's financial services industry.

Accordingly, *amici* respectfully request leave to file the accompanying brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. JOINT VENTURES FORM THE BACKBONE OF OUR NATION'S FINANCIAL SERVICES INDUSTRY AND ARE ESSENTIAL TO ITS EFFICIENT OPERATION	4
II. THE COURT OF APPEALS' APPLICATION OF THE *PER SE* RULE TO THE ORDINARY BUSINESS CONDUCT OF JOINT VENTURES IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND THE FUNDAMENTAL GOALS OF THE ANTITRUST LAWS	6
A. The *Per Se* Rule Of Antitrust Liability Condemns Conduct That Has No Purpose Or Effect Other Than To Diminish Competition	7
B. Over The Last Three Decades, This Court Has Relied On New Economic Learning And Judicial Experience To Narrow Application Of The *Per Se* Rule	10
C. The Court of Appeals' Application Of The *Per Se* Rule To Joint Ventures Is Inconsistent With This Court's Precedents	13
D. The Court of Appeals' Holding Harms The Ability Of Financial Service Businesses To Compete By Threatening Their Network Joint Ventures	17
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

Albrecht v. Herald Co., 390 U.S. 145 (1968) 12

Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001) 16

Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) ..... *passim*

California Dental Ass'n v. FTC, 526 U.S. 756 (1999) 8, 9

Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) 8

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) ..... *passim*

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 3, 4, 13

Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002) 16

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) 2, 4

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 17

NCAA v. Board of Regents, 468 U.S. 85 (1984) 8, 10, 13

National Bancard Corp. v. Visa U.S.A., 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) 16

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) ... 7, 11, 13

Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998) 12

Polk Bros. Inc. v. Forest City Enters. Inc., 776 F.2d 185 (7th Cir. 1985) 8, 14

TABLE OF AUTHORITIES – Continued

Page

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 14

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 7

State Oil Co. v. Khan, 522 U.S. 3 (1997) 12, 17

Tanaka v. University of S. Cal., 252 F.3d 1059 (9th Cir. 2001) 9

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 14

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) 14

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 11

United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964) 13

United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) 10

United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *modified in part*, 183 F. Supp. 2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004) 6

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 3, 17

White Motor Co. v. United States, 372 U.S. 253 (1963) 12

STATUTES:

15 U.S.C. § 1 7

15 U.S.C. § 15(a) 10

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) 8, 10, 15, 16

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Financial Services Act of 1998, H.R. 10: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs, 105th Cong. (1998) 5

Kimberly Gleason, Ike Mathur & Roy A. Wiggins III, *Evidence of Value Creation in the Financial Services Industry Through the Use of Joint Ventures and Strategic Alliances*, The Financial Rev. 213 (May 2003) 6

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VisaNet Fact Sheet, http://corporate.visa.com/md/fs/corporate/visanet.jsp 5

INTEREST OF *AMICI CURIAE*[1]

This case involves a significant issue in antitrust law – whether the ordinary business conduct of a joint venture that enhances economic efficiency may be condemned under the *per se* rule of liability.

The American Bankers Association is the largest banking trade association in the country. It represents banks of all sizes, including community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks.

The Consumer Bankers Association is a trade association that represents regional and super community banks as well as large bank holding companies. Its members collectively hold two-thirds of the banking industry's total assets and are leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery.

The Financial Services Roundtable represents one hundred of the largest integrated financial services companies providing banking, insurance and investment products and services to American consumers.

Amici's members are participants in many joint ventures, *e.g.*, credit card networks, debit card networks, automated teller machine networks, and various financial clearinghouse networks. Those joint ventures form the backbone of our nation's financial services industry. As a

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[1] Letters from counsel for petitioners consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). Respondents have withheld consent and, thus, a motion for leave to file this *amicus curiae* brief is being submitted as one document with the brief in accord with Supreme Court Rule 37.3(b). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

result, *amici* have a strong interest in ensuring that the lower courts do not summarily condemn under the *per se* rule of antitrust liability joint ventures that enhance economic efficiency and consumer welfare.

SUMMARY OF ARGUMENT

The court of appeals' decision to extend the *per se* rule of antitrust liability to the ordinary business conduct of joint ventures is fundamentally inconsistent with this Court's teachings and casts a shadow of uncertainty over important parts of the nation's economy, including the financial services industry. The Court should remove this uncertainty by instructing the lower courts that *per se* condemnation is the exception, not the rule, in antitrust analysis and has a very limited role to play in evaluating the lawfulness of joint ventures.

I. The financial services industry is essential to the health of our nation's economy. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980). Joint ventures form the backbone of this industry: coalitions of banks, credit unions and other financial services firms participate in joint ventures, including credit card, debit card and automated teller machine networks, to enable consumers to withdraw cash, make payments and transact business across the country and around the world. These joint ventures provide products and services that no single member could provide, and in particular enable smaller banks and other financial institutions to offer products and services that, because of their limited size and geographic reach, they could not offer on their own.

II. This Court has emphasized that the rule of reason is the "prevailing standard" of antitrust analysis. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Under this standard, a court must undertake an analysis of the conduct at issue, and the specific market and business circumstances in which that conduct arises, to

determine whether the conduct in fact diminishes competition. The *per se* rule is a truncated version of this analytical approach; where judicial experience has taught the courts that a specific type of conduct has no purpose or effect other than to diminish competition, such conduct is "conclusively presumed illegal without further examination under the rule of reason." *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) ("*BMI*").

This Court has recognized, however, that applying the *per se* rule of antitrust liability to cases that do not involve "manifestly anticompetitive" conduct undermines the purposes of the antitrust laws. *GTE Sylvania*, 433 U.S. at 50. Because "it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984), broad application of the *per se* rule is very likely to result in summary condemnation of conduct that actually enhances competition. The risk of such false condemnations, in turn, deters businesses from engaging in conduct that enhances economic efficiency and consumer welfare. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). For this reason, the Court has narrowed the application of the *per se* rule in light of new economic learning about specific types of business conduct and judicial experience with the rule's adverse effects.

The court of appeals' decision ignores this teaching and extends the *per se* rule to the ordinary business conduct of joint ventures that enhance economic efficiency. It does so because the conduct at issue in this case relates to the decision of the joint venture partners to set the price of their commonly produced products, and the court of appeals believed that agreements on price – even those that relate to the price of the joint venture product – should presumptively be subject to *per se* condemnation. Pet. App. 12a-13a. But this Court and other courts of appeals have long recognized that because joint ventures

"hold the promise of increasing a firm's efficiency and enabling it to compete more effectively," joint venture conduct that is subject to the antitrust laws is presumptively "judged under the rule of reason." *Copperweld Corp.*, 467 U.S. at 768. And while acknowledging that the establishment of the price of the venture's products is "literally 'price-fixing,'" this Court has held that such conduct contributes to the efficient operation of the venture and therefore is "not *per se* in violation of the Sherman Act." *BMI*, 441 U.S. at 9. If the rule were otherwise, joint ventures could not function efficiently, if at all.

The court of appeals' decision thus increases the risk that joint ventures of all types will find themselves the victims of unmeritorious lawsuits, in which plaintiffs seek to capitalize on the minimum burdens the *per se* rule imposes to earn antitrust treble damages. The threat of such liability is a powerful deterrent to the continuing operation of, and investment in, financial services joint ventures. The resulting harm to these networks will be felt not only by financial services firms – especially smaller banks and other institutions – but also by consumers and the economy as a whole. The court of appeals' decision threatens to undermine, not advance, the purposes of the antitrust laws and therefore should be reversed.

ARGUMENT

I. JOINT VENTURES FORM THE BACKBONE OF OUR NATION'S FINANCIAL SERVICES INDUSTRY AND ARE ESSENTIAL TO ITS EFFICIENT OPERATION

This Court has recognized that "both as a matter of history and as a matter of present commercial reality, banking and related financial activities are * * * essential to the health of [the nation's] economy and to the well-being of its people." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980). The nation's financial system "accounts for 7.5 percent of our GDP and employs 5 percent of our workforce"; it is "as competitive as ever in

recent memory." *Financial Services Act of 1998, H.R. 10: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. 61-63 (1998) (statement of Robert E. Rubin, Secretary, Department of Treasury).

The strength and competitiveness of our financial system is attributable in large measure to financial services networks, including credit card networks, automated teller machine ("ATM") and debit card networks, and automated clearinghouse networks. These networks enable institutions of all sizes – but in particular smaller institutions that lack the scale and geographic reach of some of their rivals – to offer products and services that no single firm could offer on its own. Visa and MasterCard, for example, each has more than 20,000 financial institution members and hundreds of millions of cardholders in their credit, debit and ATM networks. The Shazam ATM and debit card network has approximately 1600 member banks in 29 states. The CO-OP Network comprises 1841 credit unions, and serves 23 million cardholders in all 50 states and several foreign countries, while the Armed Forces Financial Network serves 336 credit unions and military banks and tens of millions of cardholders.

Financial services networks enable consumers to obtain cash, make purchases and transact business anywhere in the United States and in most parts of the world. According to the Federal Reserve System, network-based payments recently overtook checks as the leading type of non-cash payments. Federal Reserve System, *The 2004 Federal Reserve Payments Study: Analysis of Noncash Payment Trends in the United States: 2000-2003*, at 10 (2004), *available at* http://www.frbservices.org/Retail/pdf/2004PaymentResearchReport.pdf. The Visa network alone handles over $5 billion a day, or $3.4 trillion in transactions annually. VisaNet Fact Sheet, http://corporate.visa.com/md/fs/corporate/visanet.jsp. The "increasing use of payment networks for new or alternative payment uses," including online payment networks, will serve only to enhance the importance of financial services networks to our nation's economy. Brian Mantel & Tim McHugh,

Changing E-Payment Payment Networks in the U.S.: The Strategic, Competitive & Innovative Implications (2002), http://www.chicagofed.org/emerging_payments_and_policy/files/evolving_epayment_networks.pdf.

Most financial services networks, including many of the largest networks, are joint ventures. Coalitions of banks, credit unions and other financial service firms provide services that no single member could provide, *e.g.*, nationwide ATM services and ubiquitous credit card acceptance. *See, e.g., United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 332 (S.D.N.Y. 2001), *modified in part on other grounds*, 183 F. Supp. 2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004). For example, the Visa and MasterCard networks, the Shazam ATM network, and the CO-OP and Armed Forces Financial credit union networks are all currently organized as joint ventures. Although some financial services networks now use the corporate form, "joint venture and strategic alliances are an increasingly important mechanism for growth in the financial services industries, as evidenced by the substantially increasing number of transactions since 1990." Kimberly Gleason, Ike Mathur & Roy A. Wiggins III, *Evidence of Value Creation in the Financial Services Industry Through the Use of Joint Ventures and Strategic Alliances*, The Financial Rev. 213, 214 (May 2003). Financial services joint venture networks are, in short, the backbone of our nation's financial system.

II. THE COURT OF APPEALS' APPLICATION OF THE *PER SE* RULE TO THE ORDINARY BUSINESS CONDUCT OF JOINT VENTURES IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND THE FUNDAMENTAL GOALS OF THE ANTITRUST LAWS

The court of appeals' error in this case flows from a fundamental misunderstanding of the role of the *per se* rule in antitrust jurisprudence. Over the last 30 years, this Court has provided a series of guideposts to the

proper application of the *per se* rule and repeatedly has warned against the dangers of applying the rule to business conduct that is not "manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977). As the court of appeals' decision illustrates, however, lower courts all too frequently ignore these warnings and allow plaintiffs to use the presumptions of the *per se* rule – coupled with the threat of treble damages – to attack business conduct that, in fact, enhances competition. *Amici* believe that the Court should take this opportunity to establish clearly that *per se* condemnation is the exception, not the rule, under the federal antitrust laws and has a very limited role to play in the analysis of joint ventures.

A. The *Per Se* Rule Of Antitrust Liability Condemns Conduct That Has No Purpose Or Effect Other Than To Diminish Competition

1. The purpose of the antitrust laws is to protect consumers from conduct that makes markets less competitive. *See, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (*"BMI"*). Although Section 1 of the Sherman Act, by its terms, prohibits all agreements "in restraint of trade," 15 U.S.C. § 1, the Court recognized shortly after the statute's enactment that this proscription could not be read literally. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). This is because "every commercial agreement restrains trade." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). For almost a century, therefore, the Court has held that "[w]hether [an] action violates § 1 of the Sherman Act depends on whether it is adjudged an *unreasonable* restraint." *Ibid.*

An unreasonable restraint of trade is one that harms consumers by raising the overall market price of a good or service or decreasing the total quantity sold. *BMI*, 441 U.S. at 19-20. The judicial inquiry into whether a specific restraint has this effect necessarily depends on the

economics of the market and the restraint at issue. *See NCAA v. Board of Regents*, 468 U.S. 85, 103-104 (1984). *See also* 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1500 (2d ed. 2003) (the inquiry into the "reasonableness" of a restraint must be "disciplined by the purposes of the antitrust laws" and instructed "by knowledge of the economy generally or by experience with the particular market under scrutiny").

Historically, the Court has applied either of two basic modes of analysis in determining whether a challenged restraint is unreasonable under the antitrust laws: the rule of reason or the *per se* rule. More recently, the Court has developed a third mode of analysis – the so-called "quick look" rule of reason approach. *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *NCAA*, 468 U.S. at 109-110. All three modes of analysis, however, are merely variations of the rule of reason. The differences among them relate to the strength of the legal presumptions that apply under each rule and the allocation of various burdens in each analysis.

2. This Court and the lower courts have long recognized that "[t]he war of all against all is not a good model for any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment." *Polk Bros. Inc. v. Forest City Enters. Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) (Easterbrook, J.). Rule of reason analysis, therefore, is an inquiry into whether the *net* effect of a particular type of business conduct is to enhance competition in the marketplace, or to diminish it. *See Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). "To determine that question," Justice Brandeis wrote in his classic formulation of the rule, "the court must ordinarily consider the facts peculiar to the business in which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Ibid.*

As applied in practice, the rule of reason imposes a series of shifting burdens on litigants. First, the plaintiff

must prove that an agreement between two or more market participants has or is likely to have an adverse effect on competition. If the plaintiff is successful, the burden then shifts to the defendant to show that the agreement has procompetitive effects. If the defendant makes this showing, the burden shifts back to the plaintiff to prove that the agreement at issue is not reasonably related to the achievement of the agreement's procompetitive effects. *See, e.g., Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). Ultimately, the issue is whether the anticompetitive effects of the agreement outweigh the procompetitive effects. *See, e.g., GTE Sylvania*, 433 U.S. at 54-55 (weighing the benefits of enhanced interbrand competition against the loss of intrabrand competition).[2]

3. The *per se* rule is a specific application of this analytical framework. *See* Robert H. Bork, *The Antitrust Paradox* 18 (1978). As the Court explained in *BMI*, judicial experience has taught that certain types of agreements are so "plainly anticompetitive" and lacking "any redeeming virtue" that "they are conclusively presumed illegal without further examination under the rule of reason." *BMI*, 441 U.S. at 8.

In *per se* cases, courts presume not only that the plaintiff satisfies its burden of proof by showing the defendant has engaged in one of these types of conduct, but also that there is no evidence the defendant could offer to justify the presumptively anticompetitive conduct. For example, when two direct competitors reach an agreement, the *only* effect of which is to fix their prices or limit their sales, there is no plausible procompetitive justification for such conduct. "Horizontal price fixing and output limitation are ordinarily condemned as a matter of law

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[2] "Quick look" rule of reason analysis applies when the defendant can make a showing that the conduct at issue has arguable procompetitive effects, but "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n*, 526 U.S. at 770.

under an 'illegal *per se*' approach because the probability that these practices are anticompetitive is so high." *NCAA*, 468 U.S. at 100.

The reason that a *per se* approach is appropriate in circumstances where the conduct at issue has no possible procompetitive effects is because the benefits of such a rule in terms of certainty and judicial economy outweigh the cost of the rule's rigidity. *See GTE Sylvania*, 433 U.S. at 49-50 & n.16. To be sure, this means that the *per se* rule may condemn certain conduct that does not lessen competition. But such overbreadth is tolerated in cases where the conduct at issue has no possible procompetitive effects: "Little is lost when the court condemns a restraint that was harmless because the defendants lacked [market] power but that was socially useless in any event." 7 Areeda & Hovenkamp, *supra*, ¶ 1509c.

B. Over The Last Three Decades, This Court Has Relied On New Economic Learning And Judicial Experience To Narrow Application Of The *Per Se* Rule

If the *per se* rule is applied too broadly, and reaches conduct that enhances competition, it can be quite costly. The rule requires a plaintiff to make only a limited showing, *i.e.*, that the conduct at issue falls within a proscribed category. Having satisfied that burden, along with a showing of injury, the plaintiff is entitled to treble damages. *See* 15 U.S.C. § 15(a). The promise of such large damage awards in return for a limited investment of litigation resources encourages plaintiffs and their counsel to bring lawsuits, particularly class action lawsuits, based on *per se* theories. "The *per se* rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362-1363 (5th Cir. 1980).

The threat of *per se* liability for treble damages has, of course, an equal and opposite effect. Unless the rule's reach is carefully circumscribed, the potential for liability

will discourage individuals and businesses from engaging in conduct that creates new goods and services, enhances economic efficiency, and benefits consumers.

Recognizing that broad application of the *per se* rule will undermine the purposes of the antitrust laws, the Court has narrowed the categories of conduct to which the rule applies. Over the last three decades, the Court has relied on new economic learning and judicial experience to hold that the *per se* rule should no longer apply to various forms of conduct that may have procompetitive effects. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court reversed *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), where it had held that a manufacturer's competitive restrictions on the distribution of its goods, *e.g.*, the assignment of exclusive sales territories to its distributors, was subject to the *per se* rule. The Court held, instead, that such conduct should be judged under the traditional rule of reason standard. It emphasized that "[t]he market impact of [such] restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and yet stimulation of interbrand competition," and that "*per se* rules in this area may work to the detriment of the small businessmen who operate as franchisees" because it discourages firms "from using the franchise system to achieve efficiencies that it perceives as important to its successful operation." *GTE Sylvania*, 433 U.S. at 51, 57 & n.26.

Likewise, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Court rejected the application of the *per se* rule to all "group boycotts." In that case, members of a wholesale purchasing cooperative refused to allow one of their competitors to participate, thus depriving it of the benefit of the cost savings enjoyed by the other rivals. The Court applied the rule of reason, finding that the business activities of purchasing cooperatives "are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be 'designed to

increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 295 (quoting *BMI*, 441 U.S. at 20). *See also Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (*per se* rule against group boycotts does not apply to single buyer's decision to purchase from one seller rather than another).

The Court's narrowing of the application of the *per se* rule has involved price restraints as well. Most recently, in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Court overruled *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and held that the *per se* rule should no longer apply to agreements to establish maximum resale prices. The Court found that "there is insufficient economic justification for *per se* invalidation of vertical maximum price fixing," observing that such conduct is likely to lead to lower prices, which benefit consumers. 522 U.S. at 15, 18. Indeed, the Court found that application of the *per se* rule in this context "could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist dealers" by forcing dealers to eliminate their small independent distributors and, instead, to sell directly to customers (thereby ensuring there is no "agreement" that could give rise to antitrust liability). *Id.* at 18.

Consistent with its limiting of the reach of the *per se* rule, the Court emphasized that the "prevailing standard" of antitrust analysis is the rule of reason, *GTE Sylvania*, 433 U.S. at 49, and has warned the lower courts to apply the *per se* rule only when the challenged conduct is a "naked restraint[] of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Indeed, precisely because "easy labels do not always supply ready answers" in the antitrust context, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *BMI*, 441 U.S. at 8-9. And, because overly broad application of the *per se* rule can undermine the purposes of the antitrust laws, the Court has cautioned that any "departure from the rule-of-reason standard must be based upon demonstrable effect rather than . . . upon

formalistic line drawing." *GTE Sylvania*, 433 U.S. at 58-59.

C. The Court of Appeals' Application Of The *Per Se* Rule To Joint Ventures Is Inconsistent With This Court's Precedents

1. For much of the 20th Century, courts viewed joint ventures between competitors with suspicion, and sometimes condemned them as *per se* unlawful. But, in 1964, in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, this Court rejected that analytical approach. Noting the increasing importance of joint ventures to the growth and competitiveness of the post-war economy, the Court directed the lower courts to evaluate the lawfulness of joint ventures through a careful analysis of the markets at issue and the venture's likely competitive effects on those markets, *i.e.*, by using the rule of reason type of approach that courts use to evaluate the legality of business mergers. *See also NCAA*, 468 U.S. at 103 (rule of reason applies to joint ventures because "a joint selling agreement may be so efficient that it will increase the sellers' aggregate output and thus be procompetitive.").

Subsequently, in *BMI* and *Pacific Stationery*, the Court reversed lower court decisions that had held the joint ventures at issue in those cases to be *per se* unlawful. It did so notwithstanding the fact that the cases involved agreements among competitors to sell a combined product at a unified price (*BMI*) and to purchase products collectively at unified prices (*Pacific Stationery*). The Court acknowledged that the BMI joint venture "involve[d] 'price fixing' in the literal sense," but warned that "[l]iteralness is overly simplistic and often overbroad." *BMI*, 441 U.S. at 9. Because joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively . . . such combinations are judged under the rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

2. Consistent with this analytical framework, the Court has found that there are two exceptional circumstances in which the *per se* rule may be applied in the joint venture context. First, a purported joint venture is *per se* illegal if it is a sham, *i.e.*, an arrangement that holds no promise for increasing competition or economic efficiency, but instead is simply a cloak for engaging in price fixing. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-598 (1951).

The second exception involves certain types of "ancillary restraints." The courts have long recognized that joint ventures typically contain ancillary restraints, which are restrictions on the joint venture partners' competitive behavior *outside* the venture that are designed to promote the achievement of the venture's procompetitive objectives. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-282 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899). For example, if two automobile manufacturers form a joint venture to produce a new type of car, they may agree not to develop cars that would compete with the joint venture's product.

Ancillary restraints generally carry "a presumption of lawfulness" and are evaluated under the rule of reason, *see* 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1904 (2d ed. 2005), because restrictions of this type "contribute to the success of a cooperative venture that promises greater productivity and output." *Polk Bros.*, 776 F.2d at 189. If, however, a joint venture's partners agree to restrict competition between themselves in a manner that is wholly unrelated to the achievement of the joint venture's procompetitive purpose, such restraints may be subject to *per se* condemnation. Thus, if the two automobile manufacturers in the example above agree to fix the prices of cars that each separately produces outside of the joint venture, that restraint is wholly unrelated to the procompetitive purpose of the joint venture and may be condemned under the *per se* rule. *See, e.g., BMI*, 441 U.S. at 19-20; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

3. The cases before the Court involve joint ventures in which petitioners, two oil companies, integrated their oil refining operations, including marketing and sales, and then set the price for the commonly produced gasoline that the ventures sell under two different brand names. The court of appeals held that the joint ventures' price-setting activities are subject to *per se* rule analysis. Pet. App. 12a-13a. This holding does not just ignore the Court's teaching with respect to the proper role of the *per se* rule in antitrust analysis of joint ventures, it stands that teaching on its head.

The court of appeals begins with the presumption that an agreement between two joint venture partners as to the price to be charged for their commonly produced product is subject to the *per se* rule, and then places the burden on the partners to prove that such conduct falls within "an exception to the *per se* prohibition on price-fixing." Pet. App. 12a. But neither of the two narrow circumstances in which the *per se* rule might apply to a joint venture are present in this case. First, the court of appeals acknowledges that the joint ventures are not shams, finding that there is a "voluminous record documenting the economic justifications for creating the joint ventures," *id.* at 4a, and observing that they were also reviewed and approved by federal and state antitrust enforcement agencies, *id.* at 5a.

Second, the price-setting conduct at issue is not an ancillary restraint because it does not restrict the ability of the joint venture partners to compete outside of the venture. It is, on the contrary, ordinary business conduct that is integral to the venture itself. Every joint venture that produces a good or service must set the price of its products. As Professor Hovenkamp concludes in discussing the example of an automobile joint venture: "Once the [joint venture] automobiles are manufactured, they are jointly owned and cannot be sold without agreement between the owners as to the price that will be charged for them"; this is not "*per se* unlawful price fixing." 11 Hovenkamp, *supra*, ¶ 1908e. Indeed, as petitioners and other *amici* explain, this is not conduct to which Section 1

of the Sherman Act should apply at all. And this is true regardless of whether the joint venture partners have completely combined, or only partially combined, their business assets in the joint venture. *See* 7 Areeda & Hovenkamp, *supra*, ¶ 1478c ("once a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their *nonventure* business should generally be regarded as those of a single entity rather than the parents' daily conspiracy") (emphasis supplied).

Were the Court to apply Section 1, however, its precedents establish that where, as here, a joint venture has the promise of enhancing economic efficiency and competition, it cannot be subject to *per se* condemnation. The fact that a joint venture's partners, as part of their activities, set prices or fees relating to the venture's product does not change this conclusion. "When two partners set the price of their goods or services they are literally 'price-fixing,' but they are not *per se* in violation of the Sherman Act." *BMI*, 441 U.S. at 9. *See also Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002) (rejecting *per se* treatment of restraint on players' salaries); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) (rejecting *per se* treatment of distribution joint venture's setting of fees paid to retailers); *National Bancard Corp. v. Visa U.S.A.*, 779 F.2d 592, 602 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) (rejecting *per se* treatment of agreement among Visa members to charge an interchange fee). The court of appeals' decision reverses this long-standing rule, and subjects joint venture partners to the risk of *per se* liability for engaging in ordinary business conduct that enhances competition.

D. The Court of Appeals' Holding Harms The Ability Of Financial Service Businesses To Compete By Threatening Their Network Joint Ventures

Unless reversed, the court of appeals' decision will place a cloud of uncertainty around all types of joint ventures, including financial services network joint ventures. This uncertainty, in turn, will encourage lawsuits – particularly class action lawsuits – by plaintiffs hoping to capitalize on the minimal burdens the *per se* rule imposes. The threat of such liability is a powerful deterrent to the use of joint venture structures and to future investment in financial services networks. This Court has repeatedly warned that the risk of "false condemnations [in antitrust cases] 'are especially costly, because they chill'" procompetitive behavior by businesses. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). The Court's concern is especially acute in circumstances in which plaintiffs can seek to invoke the *per se* rule and thereby avoid having to prove that the conduct at issue actually lessens competition.

If legal uncertainty undermines investment in financial services networks, the adverse effects will be felt throughout our nation's economy. Financial services networks will become less efficient, and perhaps fewer in number. New forms of payment networks may never develop. Smaller banks and financial institutions will be disproportionately affected because financial services networks afford them the advantages of scale and geographic scope that the larger competitors may already enjoy. *Cf. Khan*, 522 U.S. at 18 (threat of *per se* condemnation may force manufacturers to eliminate their small independent distributors); *GTE Sylvania*, 433 U.S. at 57 n.26 (threat of *per se* condemnation "may work to the ultimate detriment of the small businessman"). In the end, businesses, consumers and the economy as a whole will

suffer from the declining investment in and growth of our financial services industry.

CONCLUSION

For the reasons set forth above and in petitioners' briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Nos. 04-805 & 04-814

IN THE

Supreme Court of the United States

TEXACO, INC., *Petitioner,*

v.

FOUAD N. DAGHER, et al., *Respondents.*

SHELL OIL COMPANY, *Petitioner,*

v.

FOUAD N. DAGHER, et al., *Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

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MOTION OF THE AMERICAN PETROLEUM INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Petroleum Institute ("API") hereby seeks leave, pursuant to this Court's Rule 37.3, to file the attached brief as an amicus curiae in support of Petitioners Texaco, Inc. and Shell Oil Company. Petitioners have consented to the filing of this brief, but Respondents have declined to grant their consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

API, a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry. API's more than 400 members cover all

facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question concerning the legal standard for evaluating joint ventures under the antitrust laws. Joint ventures play a significant role in the oil and natural gas industry, and many of API's members are participants in joint ventures. API's members therefore have a strong interest in the antitrust standards that apply to joint ventures, including the scope of per se illegality under the antitrust laws, so that they are not deterred from participating in legitimate, procompetitive joint ventures.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the antitrust laws. API has participated as an *amicus curiae* in other antitrust cases in this Court, including *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (scheduled for oral argument on Oct. 31, 2005), *State Oil Co. v. Khan*, 522 U.S. 3 (1997), and *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented and its significance. Accordingly, API respectfully seeks the Court's leave to file the attached brief supporting Petitioners.

Respectfully submitted.

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QUESTION PRESENTED

Whether it is per se illegal under Section 1 of the Sherman Act for participants in a lawful, economically integrated joint venture to enter into an agreement concerning the prices to be charged for products produced and sold by the joint venture.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. The Per Se Rule Does Not Apply To Decisions With Respect To The Pricing Of Products Produced And Sold By An Integrated, Efficiency-Enhancing Joint Venture 8

II. The Court Of Appeals' Decision Is Likely To Harm Competition In The Oil Industry And Elsewhere. 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 5, 8
Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) 6, 10
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 8
In the Matter of Chevron Corporation, FTC Docket No. C-4023 3
Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 16
Copperweld Corp. v. Independence Tube Co., 467 U.S. 752 (1984) 5, 8
Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) 14
National Macaroni Manufacturers Association v. FTC, 345 F.2d 421 (7th Cir. 1965) 14
In re Shell Oil Co., 125 F.T.C. 769 (1998) 3
State Oil Co. v. Khan, 522 U.S. 3 (1997) 1
Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990) 1, 12
Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 8
United States v. American Linseed Oil Co., 262 U.S. 371 (1923) 14
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 10
Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S. Ct. 872 (2004) 12
Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., No. 04-905 1

FEDERAL STATUTES

Section 1 of the Sherman Act, 15 U.S.C. § 1 ..... 3, 4
Robinson-Patman Act, 15 U.S.C. § 13 ..... 4, 5

MISCELLANEOUS

Federal Trade Commission, Bureau of Economics, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* (2004) 15
Howard H. Chang, David S. Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures,* 1998 Colum. Bus. L. Rev. 223..... 13
Herbert Hovenkamp, *Antitrust Law* (2d ed. 2005)..... 10, 11, 13
National Petroleum Council, *Observations on Petroleum Product Supply* (2004)..... 17
Thomas A. Pirano, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors,* 86 Iowa L. Rev. 1137 (2001)..... 9

INTEREST OF AMICUS CURIAE

The American Petroleum Institute ("API"), a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry.[1] API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question concerning the legal standard for evaluating joint ventures under the antitrust laws. Joint ventures play a significant role in the oil and natural gas industry, and many of API's members are participants in joint ventures. API's members therefore have a strong interest in the antitrust standards that apply to joint ventures, including the scope of per se illegality under the antitrust laws, so that they are not deterred from participating in legitimate, procompetitive joint ventures.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the antitrust laws. API has participated as an *amicus curiae* in other antitrust cases in this Court, including *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (scheduled for oral argument on Oct. 31, 2005), *State Oil Co. v. Khan*, 522 U.S. 3 (1997), and *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented and its significance.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for API states that no counsel for a party authored this brief in whole or in part, and that no person other than API, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT

1. In 1998, Petitioners Texaco, Inc. and Shell Oil Co. formed two joint ventures for the purpose of refining, transporting, and marketing gasoline in the United States. One joint venture, Motiva, was formed by Petitioners and a third partner to operate Petitioners' combined downstream assets in the eastern United States.[2] Petitioners formed a second joint venture, Equilon, to operate their downstream assets in the western United States. Only the Equilon joint venture remains at issue before this Court.[3]

Petitioners contributed all of their downstream assets in the United States to the new entities, including "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees." Pet. App. 4a n.3. Petitioners agreed to divide Equilon's profits or losses according to a fixed ratio (56 per cent to Shell, 44 per cent to Texaco), based on the value of the assets that each partner contributed to the joint venture.

Petitioners also granted Equilon an exclusive license to sell gasoline under the Shell and Texaco brand names in the western United States. Petitioners decided that Equilon would maintain both the Texaco and Shell brands

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[2] "Downstream" operations include refining and marketing gasoline and other petroleum products. Shell Pet. App. 2a n.1. (hereinafter "Pet. App."). "Upstream" operations include exploration for and production of crude oil and natural gas. *Id.*

[3] The district court entered summary judgment in favor of Petitioners on all Respondents' claims involving Motiva, on the ground that Respondents never purchased any products from Motiva. Pet. App. 62a-74a. The court of appeals affirmed that ruling, and it has not been challenged in this Court. *Id.* at 9a-11a.

rather than sell gasoline under a single brand. It was further decided that Shell-branded and Texaco-branded gasoline would be sold at the "same price in the same market areas," Pet. App. 5a, and that Equilon would determine the price.[4]

Petitioners continued to compete with each other in a variety of areas that are outside the scope of the joint venture, including upstream operations, foreign operations, chemicals, aviation fuels, and marine fuels. Pet. App. 47a. The joint venture agreement was subject to termination at any time by mutual consent of the parties, or by either party after five years (subject to two years' notice). Pet. App. 4a.[5]

The Federal Trade Commission and the attorneys general of California, Hawaii, Oregon, and Washington conducted an extensive investigation of the proposed Equilon joint venture. At the close of the investigation, the FTC and Petitioners entered into a consent decree that required divestiture of certain assets but did not restrict Equilon's pricing decisions. *See In re Shell Oil Co.*, 125 F.T.C. 769, 778-811 (1998).

2. Respondents, a class of approximately 23,000 operators of Shell and Texaco service stations in the western United States, filed this action in 1999 alleging that Shell and Texaco entered into a per se unlawful agreement to fix prices under Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondents expressly "disclaimed

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[4] The court of appeals stated that this decision was made "either immediately before the formation of the joint ventures or sometime shortly thereafter." Pet. App. 4a-5a.

[5] In 2002 Shell acquired Texaco's interest in Equilon, in accordance with conditions that the FTC imposed on the combination of Texaco and Chevron. *See In the Matter of Chevron Corporation*, FTC Docket No. C-4023 (Decision and Order entered January 4, 2002).

any reliance on the traditional 'rule of reason' test." Pet. App. 6a.

The district court entered summary judgment for Petitioners. The court found that Equilon was an economically integrated joint venture formed to realize efficiencies and cost savings estimated to be worth hundreds of millions of dollars annually. Pet. App. 41a-42a. In rejecting Respondents' per se argument, the district court observed that "every . . . joint venture must, at some point, set prices for the products they sell." *Id.* at 43a. The court concluded that Respondents' per se approach would amount to "a per se rule against joint ventures between companies that produce competing products." Pet. App. 45a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-35a. The majority acknowledged that "there is a voluminous record documenting the economic justifications for creating the joint ventures," including Petitioners' determination "that numerous synergies and cost efficiencies would result" from the joint ventures, yielding "up to $800 million in cost savings annually." Pet. App. 3a. The court of appeals also recognized that the joint ventures "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." Pet. App. 4a. The majority nevertheless concluded that the agreement to establish a unified price for the joint venture's products should be deemed a "naked" restraint of trade, and held to be a per se violation of Section 1 of the Sherman Act, absent a showing that it was "reasonably necessary to further the legitimate aims of the joint venture." *Id.* at 28a. The majority held that Petitioners had failed to make such a showing. *Id.*

The court rejected Petitioners' explanation that the unified pricing provision was intended to avoid potential actions for price discrimination under the Robinson-

Patman Act, 15 U.S.C. § 13, on the ground that the Robinson-Patman Act is "unquestionably . . . inapplicable." Pet. App. 26a. The court of appeals also rejected Petitioners' argument that application of a per se rule would prevent joint ventures from setting prices for their products. The court concluded that the per se rule should apply unless the parties to the joint venture can "demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture." *Id.* at 28a. Although the majority viewed the record in this case as "close" to supporting summary judgment for Respondents, it decided to remand for a determination of whether the "price fixing scheme was ancillary rather than naked." *Id.* at 24a n.16, 28a.

Judge Fernandez dissented. He observed that it is Equilon, rather than Petitioners, that competes in the business of refining, transporting, and marketing gasoline in the western United States. *Id.* at 31a-32a. In his view, "nothing more radical is afoot than the fact that an entity . . . prices its own products." Pet. App. 34a.

SUMMARY OF ARGUMENT

1. The per se rule does not apply to decisions with respect to the pricing of products produced and sold by an integrated, efficiency-enhancing joint venture. This Court has recognized that, as a general matter, joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 768 (1984). Indeed, when parties who would otherwise be competitors "pool their capital and share the risks of loss as well as the opportunities for profit," the resulting entity is "regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982).

Equilon was an integrated production and marketing joint venture. When Petitioners formed Equilon, they ceased competing with each other in the production and marketing of gasoline in the western United States. Petitioners pooled their productive assets to create a single new entity, sharing the risks of loss and the opportunities for profit. In these circumstances, there is no basis for applying the per se rule of illegality to decisions with respect to the pricing of Equilon's products. This Court has recognized that "[w]hen two partners set the price of their goods or services, they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 9 (1979). The antitrust analysis does not change because the joint venture produced and sold products under two brand names rather than one, or because it charged the same prices, rather than different prices, for the two brands. The dispositive point is that Equilon was an integrated joint venture that eliminated competition between Petitioners in the production and marketing of gasoline in the western United States.

2. The court of appeals' decision reflects unwarranted judicial hostility towards joint ventures that will harm competition in the oil and gas industry and elsewhere. The consequences of civil liability under the Sherman Act, including treble damages and attorney's fees, are severe. If private plaintiffs can challenge joint ventures under a per se theory, without even attempting to show that the joint venture actually harms competition, firms will be much less willing to participate in joint ventures. Antitrust law should not prefer one form of business organization over another absent a good reason to believe that the disfavored structure is likely to cause anticompetitive harm that the favored structure is not. There is no reason to systematically discourage firms from entering into joint ventures. Indeed, joint ventures are often preferable to mergers or acquisitions from an

antitrust point of view, since they may preserve a greater degree of competition between the participants.

The court of appeals' decision will have a negative impact on the oil and gas industry, where joint ventures play an important role. A federal agency recently concluded that joint ventures have allowed U.S. oil companies to share assets and operations, reduce costs, and use productive capacity more efficiently. Another recent federal government study found that significant multi-refinery scale economies can be achieved through joint ventures, particularly in gasoline production, and noted that it may not be possible to achieve these synergies absent joint ventures or mergers. The study concluded that other segments of the oil and gas industry, such as pipelines, also depend heavily on joint ventures. Recent developments have highlighted the need for continued investments by U.S. companies in oil and gas production and refining. The court of appeals' decision creates an unjustified obstacle to the use of flexible joint venture structures that are needed to ensure that such investments can be made in the most efficient manner.

ARGUMENT

The court of appeals applied the wrong legal analysis to an integrated joint venture created by the Petitioners to combine all of their downstream petroleum operations. Petitioner's creation combined two separate economic actors into a single, unified entity. Nevertheless, the court of appeals isolated one aspect of the new venture's operations — the decision to set a single price for both of the venture's gasoline brands — and analyzed it as if it were an agreement between competitors rather than a feature of the newly created entity. The court of appeals' analysis is inconsistent with this Court's precedents, and creates uncertainty as to the legal standard governing a range of existing and future joint ventures that are

essential to the efficient operation of the oil and gas industry.

I. The Per Se Rule Does Not Apply To Decisions With Respect To The Pricing Of Products Produced And Sold By An Integrated, Efficiency-Enhancing Joint Venture.

The court of appeals erred in holding that the per se rule may govern a decision to charge unified prices for products produced and marketed by an integrated joint venture such as Equilon.[6] As a general matter, joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 768 (1984). "Accordingly such combinations are judged under a rule of reason" rather than the per se rule. *Id.* Indeed, when the joint venture involves a "partnership[ ] or other joint arrangement[ ] in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit" it is "regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982).

To be sure, a purported joint venture may be subject to condemnation under the per se rule if it is a mere sham – that is, if it involves no actual, efficiency-enhancing integration of economic activity. *See Timken Roller*

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[6] The per se rule imposes "a conclusive presumption that the restraint [at issue] is unreasonable," and is limited to situations in which "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982). Under the rule of reason standard, "the factfinder weighs all of the circumstances" in deciding whether a challenged restraint is unreasonable. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988).

Bearing Co. v. United States, 341 U.S. 593, 597-98 (1951). But there is no suggestion that the Equilon joint venture was a sham. To the contrary, it is undisputed that Equilon was an integrated joint venture in which Petitioners pooled their assets, shared the risks of loss and opportunities for profit, and achieved hundreds of millions of dollars each year in efficiencies.

Equilon's integrated nature led federal and state antitrust enforcement officials to analyze its formation as a merger rather than a joint venture that involved ongoing competition between the participants.[7] The court of appeals failed to consider whether Equilon should be analyzed as a merger of Petitioners' downstream businesses. Instead, it erred by engaging in a form of antitrust analysis that is properly applied to conduct affecting competition outside of the joint venture.[8]

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[7] The federal antitrust enforcement agencies generally analyze a joint venture as a merger when: "(a) the participants are competitors in [the] relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently specific and limited period [generally 10 years] by its own specific and express terms." Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors § 1.3 (Apr. 2000) (hereafter "*Competitor Collaboration Guidelines*"). There is no dispute that the Equilon joint venture meets these requirements.

[8] The court of appeals' confusion is illustrated by its quotation from a law review article related to a proposed standard of review for "ancillary agreements that limit competition among [the joint venture partners]." *See* Thomas A. Pirano, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1188 (2001); Pet. App. 22a n.14. The article cited by the court of appeals recognizes that where, as in this case, "the parties contributed all of their (continued...)

The fact that the joint venture, like a merged entity, determines the prices for the products it produces and sells is not a basis for applying the per se rule of illegality. While it is certainly true, as a general rule, that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), this Court has recognized that not every practice that can be described as "price fixing" automatically qualifies for condemnation under the per se rule. In *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), the Court approved an arrangement under which a single price was established for a blanket license to thousands of copyrighted musical compositions. The Court explained that "[w]hen two partners set the price of their goods or services, they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* at 9.

This result would follow even if the participants in the joint venture were competitors. As a respected commentator has noted, "joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold. When joint owners are also competitors, the result is literally 'price fixing,' but it is a form of price fixing that should, when bona fide, be examined under the rule of reason." XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2132c, at 180 (2d ed. 2005). In this case, however, Petitioners ceased to be competitors in the relevant markets when they entered into the joint ventures, contributed their downstream assets in the United States to the joint ventures, and agreed to share

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existing production or marketing operations in the relevant market to the venture" the venture should be analyzed as a merger and that the ancillary agreement rule cited by the court of appeals would be inapplicable. *Id.* at 1168.

profits and losses in proportion to the value of the resources they contributed.

The prices of Equilon's products unquestionably were an integral part of its business of producing and marketing gasoline. *See* XI Hovenkamp, *supra*, ¶ 1908e, at 263-64 ("agreements about price are often essential to the administration of certain joint ventures, particularly in distribution"). The court of appeals thought it was significant that the products of the joint venture were sold under two brand names rather than one. Pet. App. 23a. But this fact does not alter the antitrust analysis. Whether sold under a single brand or two brands, the products were produced, marketed, and sold by Equilon. Petitioners were no longer competitors in seeking to maximize sales of Texaco-branded gasoline at the expense of Shell-branded gasoline, or vice versa, but instead were seeking to maximize the overall success of the joint venture in competition with other producers and sellers of gasoline.

The court of appeals also thought it was significant that the agreement provided for charging the same price for Shell and Texaco gasoline in a given geographic area, rather than different prices. Pet. App. 5a. Again, this aspect of the agreement does not change the antitrust analysis, let alone provide a basis for applying the per se rule. Having agreed to contribute all their downstream assets to Equilon and to share profits and losses in proportion to the value of the assets they contributed, Petitioners were no longer competitors. Decisions with respect to pricing the joint venture's products could not harm competition, because the joint venture eliminated competition between Petitioners.[9]

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[9] Equilon and Petitioners had an incentive to charge different prices for Shell and Texaco brands if by doing so they could increase the overall profitability of the joint venture. This lends (continued...)

II. The Court Of Appeals' Decision Is Likely To Harm Competition In The Oil Industry And Elsewhere.

The court of appeals' decision reflects unwarranted judicial hostility towards joint ventures that is likely to harm competition and consumers. This Court recently observed that "false condemnations" under the antitrust laws "are especially costly, because they will chill the very conduct the antitrust laws are designed to protect." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S.Ct. 872, 882 (2004). By extending the per se rule beyond its proper boundaries and subjecting integrated joint ventures to a risk of per se illegality, the court of appeals' decision will deter firms from participating in procompetitive joint ventures, including in particular joint ventures in the oil and gas industry.

The consequences of civil liability under the Sherman Act are severe, including treble damages and attorney's fees. Firms will be reluctant to place themselves in a situation in which private plaintiffs can seek treble damages under a per se theory without even attempting to show that the conduct at issue has anticompetitive consequences. Accordingly, if integrated joint ventures

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support to Petitioners' contention that the uniform price provision avoided possible price discrimination claims under the Robinson-Patman Act. The court of appeals dismissed this argument out of hand, Pet. App. 25a-27a, but it may have failed to consider that Robinson-Patman Act litigation is not an unusual occurrence in the oil industry, *see, e.g., Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990), and that Equilon would have incurred costs in reviewing price differences to ensure compliance with the Robinson-Patman Act and dealing with Robinson-Patman claims, even if such claims ultimately were determined to lack merit.

present a risk of per se illegality, firms will be far less willing to participate in them.

Firms regularly choose joint ventures over other possible business structures, such as mergers or acquisitions. In the absence of a valid basis for concluding that joint ventures pose greater threats to competition than mergers, antitrust law should not favor one business structure over another. *See* Howard H. Chang, David S. Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 262 (It is a "first principle" "that antitrust policy should not bias the selection of a form of business organization by entrepreneurs and investors."). Indeed, joint ventures often may be preferable to mergers from an antitrust point of view. As the Department of Justice and the FTC have explained, "[m]ost mergers completely end competition between the merging parties in the relevant market(s). By contrast, most competitor collaborations preserve some form of competition among the participants." *Competitor Collaboration Guidelines* at § 1.3. In addition, "[m]ergers are designed to be permanent, while competitor collaborations are more typically of limited duration." *Id.*

The court of appeals' decision will discourage potential participants from forming integrated joint ventures that involve an agreement as to the price of the venture's output. Because "agreements about price are often essential to the administration of certain joint ventures," XI Hovenkamp, *supra*, ¶ 1908e, at 263-64, this will prevent many beneficial joint ventures from getting off the ground. Moreover, the logic of the court of appeals' decision may threaten other procompetitive joint ventures as well. The rule of per se illegality has been applied not only to naked price-fixing agreements, but also to other types of horizontal agreements that are not part of an efficiency-enhancing integration of economic activity.

Thus, for example, naked agreements determining output, *Hartford-Empire Co. v. United States*, 323 U.S. 386, 406-07 (1945); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389-90 (1923), or fixing the amount of a basic input, *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 424 (7th Cir. 1965), have been held to be per se illegal. On the basis of such decisions, the court of appeals' reasoning could be extended to call into question a wide range of joint venture agreements. For example, under the rationale of the court of appeals' decision, a production joint venture could be challenged as a per se violation of the antitrust laws on the ground that it involved an agreement fixing the amount of production or the amount of an input to the production process.

The chilling effect of the court of appeals' decision will apply with particular force to joint ventures in the oil and gas industry. A recent report by a U.S. government agency concluded that joint ventures provide U.S. oil companies "with a way of reducing their costs by sharing assets and operations without some of the problems of a full-scale merger of the two companies involved." Energy Information Administration, *The U.S. Petroleum Refining and Gasoline Marketing Industry* (updated August 19, 2004) (available at www.eia.doe.gov/emeu/finance/usi&to/downstream/index.html. The EIA Report describes recent examples of joint ventures in gasoline refining and marketing including, in addition to the Equilon and Motiva joint ventures, a Marathon Ashland joint venture involving downstream operations that "is anticipated to result in savings of $200 million annually in operating costs" and joint ventures "involving a single refinery with each partner having a 50-percent share of the venture." *Id.* The EIA Report notes that these joint ventures "are aimed at reducing costs either through reducing or eliminating redundancies, reducing logistical costs, or reducing unused capacity." *Id.*

Similarly, a recent FTC report concludes that there are "[s]ignificant multi-plant scale economies in refining" that can be achieved through joint ventures. FTC, Bureau of Economics, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* 180 (2004) (hereafter "FTC Staff Study"). The FTC Staff Study concludes that "[t]echnical constraints that otherwise would be binding if refineries were run in isolation can be relaxed if a firm operates in multiple sites as a single refinery." *Id.* The FTC Staff Study identifies four specific sources of efficiencies: "First, there may be volume-related purchase or transport benefits in obtaining crude oil for multiple refineries. Second, a refiner may be able to exchange intermediate feedstocks among nearby refineries to utilize each of the refineries' various units more fully and to produce the highest value finished products. Third, a refiner may be able to blend the outputs from each of the refineries to increase the amount of higher value finished products, such as gasoline or diesel fuel, that the refineries can produce. Finally, multi-refinery operation may permit capital savings when process upgrades are made. For example, when a refiner considers adding new downstream processing units, it may be more efficient to add one large unit at one refinery and ship intermediate feedstock from a second refinery rather than build separate smaller units at the two refineries." *Id.* at 180-81.[10]

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[10] In some situations it may be possible to achieve multi-refinery synergies through purchase and sale agreements, joint input purchasing arrangements, or product exchanges. But as the FTC Staff Study notes, "transaction costs considerations in some instances require a merger or joint venture to achieve these synergies or to realize them more fully." FTC Staff Study 181 n. 23. For example, firms may find it difficult to value feedstocks that are "lightly traded" and "do not have a widely acknowledged market price." *Id.* Contractual approaches may (continued...)

Gasoline production, in particular, presents opportunities to achieve significant efficiencies through multi-refinery operations. As the FTC Staff Study explains, "[f]inished gasoline is a complex blend of various intermediate refinery streams that must meet finished gasoline specifications, such as sulphur content, Reid Vapor Pressure, and octane. Different refineries may have different constraints on specifications of gasoline that can be produced. For example, it may be possible to increase the total amount of gasoline produced, or to produce it at lower cost, by blending higher octane, higher sulphur gasoline from one refinery with lower octane, lower sulphur gasoline from another refinery." The FTC Staff Study concludes that "[t]he advantages of multi-refinery operation probably have become more important since the mid-1980s because of the larger number of environmental mandates for gasoline specifications." *Id.* at 181.

Other segments of the oil and gas industry, in addition to refining, rely heavily on joint ventures. For example, "[j]oint ventures are a common ownership structure for pipelines because of the economies of scale and high capital costs of pipelines." FTC Staff Study at 161. Oil and gas producers regularly form joint ventures at every level of the petroleum supply chain to share the enormous risk and expense of exploring for and producing oil. "Capital needs in refining compete with capital needs

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also be unsuitable "when parties are unable to specify contractual contingencies sufficiently, perhaps because the likelihood of different future outcomes is too difficult to predict or agree upon." *Id.* These problems are "magnified when firms must make significant sunk investments that are specific to the proposed exchange." *Id.* If potential participants in a joint venture face a risk of per se antitrust liability, it may become impossible to achieve multi-refinery synergies through a joint venture.

in other petroleum segments as well as capital needs of other industries. . . . While no two industry participants are likely to access capital funding in exactly the same way, no participant has unlimited access to resources." National Petroleum Council, *Observations on Petroleum Product Supply* I-17 (2004). Forming joint ventures to develop a particular project may provide access to sufficient capital that a single company alone could not provide.

The form that the collaboration takes – a merger, a fully-integrated joint venture, or a more limited collaboration – should be based on actual business and economic factors, not on the use of pejorative labels like "price fixing scheme." Pet. App. 28a. *Cf. Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n. 21 (1977) ("an antitrust policy divorced from market considerations would lack any objective benchmarks."). Requiring owners of a joint venture to justify a perceived restraint on competition between them that no longer exists lacks any basis in economic reality and unsettles the legal standards governing integrated joint ventures.

In sum, the availability of a flexible joint venture framework is beneficial to competition and consumers. The benefits are particularly significant in undertaking risky and capital-intensive projects and in coordinating complex productive assets such as refineries. Recent disruptions in gasoline refining and transportation resulting from Hurricane Katrina underscore the need for continued investments in gasoline production and refining. The unduly restrictive and punitive antitrust regime adopted by the court of appeals would hinder companies from developing and implementing flexible business structures that are best suited to making these investments and competing in a global industry.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States of America ("Chamber") respectfully moves this Court to grant it leave to file the accompanying brief as an *amicus curiae* in support of the petitioners. Counsel for the petitioners has consented to the filing of this brief, but counsel for respondents has not.

The Chamber, a nonprofit corporation organized under the laws of the District of Columbia, is the world's largest business federation. The Chamber has an underlying membership of more than three million members, including corporations and professional organizations of every size, in every industry sector, located in every region of the United States. A primary function of the Chamber is to advocate and represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber seeks to participate as an *amicus curiae* in this matter because the decision rendered below by the Court of Appeals for the Ninth Circuit in this case will have demonstrably adverse effects on Chamber members and on businesses operating in the United States generally. The Chamber and its members have a substantial interest in ensuring that legitimate existing and prospective joint ventures (and joint venture partners) will not face *per se* antitrust liability for pricing their own products, or for engaging in other basic activities necessary for joint ventures to exist and function.

The Chamber therefore respectfully requests that this Court grant its motion for leave to file the accompanying brief as an *amicus curiae*.

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QUESTION PRESENTED

Whether an agreement by parties to an economically integrated, legitimate joint venture, relating to the pricing of the joint venture's products following its formation, may properly be condemned as a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* i

QUESTION PRESENTED iii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. The Court Of Appeals Erroneously Held That The Post-Formation Pricing Practices Of An Integrated Joint Venture Give Rise To A Cognizable "Agreement" Under Section 1 Of The Sherman Act, And That Such Practices Can Properly Be Condemned As Illegal *Per Se* 3

A. The Court Of Appeals' Decision Contradicts The Supreme Court's Holding In *Copperweld* That Section 1 Does Not Apply To Unilateral Conduct. 5

B. The Court of Appeals Erroneously Held That The Joint Venture's Pricing Practices Could Be Condemned As *Per Se* Illegal 10

1. It Is Well-Settled That *Bona Fide* Joint Venture Conduct Is Subject To Rule Of Reason Analysis Under Section 1 Of The Sherman Act 10

2. The Court Of Appeals Wrongly Relied On *Citizen Publishing Co. v. United States* As A Basis For Applying *Per Se* Analysis 13

II. The Ninth Circuit's Decision Compromises The Predictability Of The Legal Treatment of Joint Ventures And Is Detrimental To The Business Community and the U.S. Economy 15

A. Joint Ventures Generate Efficiencies And Other Economic Benefits 15

B. Joint Ventures Are Encouraged By The Courts And Federal Antitrust Agencies 19

Conclusion 22

TABLE OF AUTHORITIES

Cases

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represents its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

Many of the Chamber's members participate in or are otherwise involved with joint ventures, which are ubiquitous in today's global economy. Joint ventures are essential for the profitability and competitiveness of the Chamber's members, and, indeed, for United States businesses in general. Among other economic benefits they provide, joint ventures promote the ability of United States businesses to

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for petitioners have consented to the filing of this brief, and copies of the letters of consent have been filed with this brief. Because counsel for respondents has refused such consent, this brief is accompanied by a Motion for Leave to File Brief as *Amicus Curiae* (*supra* at i-ii).

compete effectively in the global marketplace, expand into new markets, make costly investments, and engage in innovation.

STATEMENT

Amicus curiae adopts the Statement of the Case presented by the petitioners.

SUMMARY OF THE ARGUMENT

This Court and other federal courts, with the singular exception of the decision below, have applied rule of reason analysis to determine whether joint venture activity contravenes the Sherman Act, 15 U.S.C. §§ 1, *et seq*. The court of appeals in *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108 (9th Cir. 2004),[2] wholly disregarded this substantial and uniform precedent. Reversing the district court's grant of summary judgment, the court of appeals erroneously held that the pricing practices of Equilon Enterprises, LLC ("Equilon") – a concededly legitimate and lawful joint venture between petitioners Shell Oil Company ("Shell") and Texaco, Inc. ("Texaco") – may be condemned as *per se* illegal.

As a threshold matter, the Court of Appeals for the Ninth Circuit erred by holding that the post-formation pricing practices of a single enterprise can give rise to a legally cognizable "agreement" under Section 1 of the Sherman Act. Assuming *arguendo* that such an "agreement" could be found to exist, the Ninth Circuit further erred by reviewing a legitimate joint venture's pricing of its own products under a *per se* rather than rule of reason analysis. By applying the *per se* rule, the court of appeals disregarded the well-settled

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[2] Citations to *Dagher v. Saudi Refining, Inc* , 369 F.3d 1108 (9th Cir. 2004), hereafter will be to the Appendix to the Petition for a Writ of Certiorari submitted by Petitioner Texaco, Inc. ("PA").

legal standards governing the business practices of joint ventures and, concomitantly, undermined the legal certainty critical to the ability of businesses to engage in joint venture activity. The significance and chilling effect of the decision below, if not reversed, cannot be overstated, because joint ventures are indispensable to the U.S. economy.

For these reasons, the Court should reverse the decision below to correct the Ninth Circuit's fundamental errors, to reaffirm the appropriate antitrust standards under which joint venture activity is assessed, and to prevent a chilling effect on the formation and operation of legitimate, pro-competitive joint ventures.

ARGUMENT

I. The Court Of Appeals Erroneously Held That The Post-Formation Pricing Practices Of An Integrated Joint Venture Give Rise To A Cognizable "Agreement" Under Section 1 Of The Sherman Act, And That Such Practices Can Properly Be Condemned As Illegal *Per Se*

The court below held that the respondents stated a triable issue of fact as to whether a joint venture's "unified pricing scheme was a *per se* violation of § 1 of the Sherman Act." PA 28a. The court reached this conclusion by misapplying well-settled antitrust law to the facts as alleged. The court of appeals erroneously concluded that a factual issue existed as to whether the pricing practices had been adopted by competing independent entities, rather than a single, economically integrated joint venture. But, assuming *arguendo* that the requisite plurality existed for purposes of finding an underlying "agreement," Equilon's price-setting practices cannot properly be condemned as a *per se* violation of Section 1 of the Sherman Act.

The court of appeals' misguided analysis flies in the face of the following undisputed facts of record, which

demonstrate the legitimacy of the joint venture, the unilateral nature of its price-setting actions, and the economic benefits that it created:

- Equilon is one of two wholly-owned joint ventures formed by Shell and Texaco to refine, transport, and market gasoline products in the United States. The creation of the joint ventures was approved by the Federal Trade Commission ("FTC") and several states attorneys' general, following an in-depth review. PA 4a.
- The court of appeals itself conceded that the joint ventures were "bona fide." PA 16a. *See also* PA 4a ("There is a voluminous record documenting the economic justifications for creating the joint ventures.").
- Upon formation, Shell and Texaco transferred at least "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees" to the joint ventures. *Id.* at n.3. After transferring these assets to the joint ventures, Shell and Texaco ceased to compete in this market in the United States. PA 4a.
- Equilon operated in the Western United States and had an exclusive license to sell gasoline under the Shell and Texaco brand names in that region.
- The pricing provision in the joint venture agreement was entirely contingent on the formation of the joint ventures, and came into effect only *after* the joint ventures had been formed and Shell and Texaco had exited the respective markets. PA 5a.
- Following Equilon's formation, a single individual at Equilon set prices for the products refined, transported, marketed, and sold by Equilon. *Id.* Equilon priced *only* the products that it manufactured and owned.

- Equilon produced significant efficiencies and cost savings.

These facts underscore the gravity of the Ninth Circuit's error, which this Court should correct.

A. The Court Of Appeals' Decision Contradicts This Court's Holding In *Copperweld* That Section 1 of the Sherman Act Does Not Apply To Unilateral Conduct

The court of appeals held that a triable issue of fact existed as to whether Shell's and Texaco's agreement that Equilon would set prices for its products constituted a *per se* violation of Section 1 of the Sherman Act. The record is clear, however, that this "agreement" was entirely contingent on the formation of the proposed joint venture, and that it took effect only *after* the Equilon joint venture had been formed. PA 6a. As a consequence, there was no cognizable price fixing "agreement" between independent economic actors. Rather, the actual conduct at issue – the setting of uniform prices for the Shell and Texaco brands – pertained only to the venture's own output and took effect only once the joint venture came into existence. In this regard, the court of appeals' analysis is at odds with this Court's determination in *Copperweld Corp. v. Independence Tube Corp.*, in which the Court held that a single entity by its nature cannot conspire with itself. 467 U.S. 752, 768 (1984).

In *Copperweld*, this Court stated explicitly that the reach of Section 1 of the Sherman Act is limited to concerted activity by independent entities in unreasonable restraint of trade. *Copperweld Corp.*, 467 U.S. at 769 ("The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms 'contract, combination . . . or conspiracy' in § 1 [of the Sherman Act]."). If the conduct in question does not involve separate economic actors, there can be no Section 1 claim. *See id.* at 768 (stating that

"wholly unilateral" conduct cannot be unlawful under Section 1 of the Sherman Act).

The court of appeals conceded that Equilon was a legitimate joint venture between Shell and Texaco, and there is no allegation that Shell and Texaco improperly coordinated their prices prior to the formation of the joint venture. Nonetheless, the court reviewed Equilon's pricing practices as though it had been undertaken by independent economic actors. The court of appeals relied heavily on the fact that Equilon sold products under the Shell and Texaco brands, notwithstanding that in the same breath, the court conceded that the brands had been brought under the control of a single joint venture and were no longer competitors.[3] The court of appeals' preoccupation with separate brands distracted the court from the key analysis that it should have applied. It effectively confused *multiple brands* with *multiple actors*.

The correct analysis – which was not followed by the court of appeals – focuses on whether the conduct alleged involved independent economic actors. *See Copperweld Corp.*, 467 U.S. at 769 (stating that a court must examine whether the challenged conduct arises from an agreement of "separate economic actors pursuing separate economic interests"). So long as the conduct in question is that of a "single economic unit," "the very notion of an 'agreement' in Sherman Act terms . . . lacks meaning." *Id.* at 771. Since

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[3] The court of appeals framed the question before it: "[D]efendants have asked us to find an exception to the *per se* prohibition on price fixing where two entities have established a joint venture . . . [but] continue to sell their *formerly* competitive products and distinct brands." PA 13a (emphasis added). "The question is whether two *former* . . . competitors may create a joint venture in which they unify the pricing . . . of two of their distinct product brands." PA 26a (emphasis added).

Equilon was a "single economic unit" following its formation, this should have been dispositive under *Copperweld*.

The court of appeals attempted to sidestep *Copperweld* by positing that Shell and Texaco agreed to fix prices *before* forming the lawful joint venture in Equilon: "[T]he companies fixed the prices of those two brands of gasoline... by agreeing *ex ante* to charge the exact same price for each." PA 13a. The court reasoned: "[T]he decision by Texaco and Shell to include in their joint ventures a unified pricing scheme was not a decision made by a single economic entity – it was a decision made by competitors." PA 19a.

Even assuming *arguendo* that Shell and Texaco entered into the posited agreement "*ex ante*", that is, prior to Equilon's formation (as respondents allege and the court of appeals assumed), no one contends that the agreement had any force or effect *before* Equilon was formed.[4] Rather, it is undisputed that any such "*ex ante*" agreement was incident to discussions between Shell and Texaco regarding how the joint venture would operate *following* its formation, and that it was entirely conditional on the successful formation of the joint venture following its review and clearance by the FTC and several states Attorneys General.

The Ninth Circuit goes to great lengths in a futile effort to establish that the "*ex ante*" agreement was not "ancillary" to the joint venture. In point of fact, however, the instant case involved the *complete integration* of Shell's and

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[4] In fact, the court of appeals states that "the record reveals that, either immediately before the formation of the joint ventures or sometime shortly thereafter, 'a decision was made that the Shell and Texaco brands would have the same price in the same market areas." PA 6a. The court of appeals' utter disregard for *Copperweld* underscores the fundamental flaw in its concerted conduct analysis under Section 1.

Texaco's downstream operations. That pricing of the Shell and Texaco brands would be under unitary control was therefore implicit in the joint venture itself – just as it would be in any merger. Herbert Hovenkamp notes: "[A]greements about price are often essential to the administration of certain joint ventures, particularly in distribution." XI Herbert Hovenkamp, Antitrust Law § 1908e, at 264 (2005) [hereinafter Hovenkamp, *Antitrust Law*]. *See also Broad. Music, Inc., v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979). Citing the GM and Toyota joint venture to manufacture automobiles, Hovenkamp goes on to explain: "Once the automobiles are manufactured [by the joint venture], they are jointly owned and cannot be sold without an agreement between the owners as to the price to be charged for them . . . ." Hovenkamp, Antitrust Law § 1908e, 264 (2005).

In sum, the posited "*ex ante*" agreement was intrinsic to the formation of the joint venture itself, was entirely contingent on the successful formation of the venture, and had absolutely no force or effect until after the venture was formed. Viewed in this context, the court of appeals' attempt to distinguish the *Copperweld* doctrine is demonstrably misguided. The basic flaw in the court of appeals' analysis was its failure to appreciate that post-formation joint venture conduct should be treated as single-firm conduct, consistent with this Court's teaching in *Copperweld*.[5]

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[5] While it is undisputed that a joint venture's formation is not exempt from scrutiny under Section 1, neither the court of appeals nor respondents take issue with the legality of the underlying joint venture agreement, pursuant to which Shell and Texaco agreed to combine their operations and thereby end competition between them in the joint venture's field.

The illogic of the court of appeals' newly-minted "*ex ante* agreement doctrine" is demonstrable in that it would subject single-firm conduct to ongoing Section 1 scrutiny whenever parties to a proposed joint venture – or, for that matter, a proposed merger – engage in discussions directed at how the unified enterprise will be run following its formation. And, to the extent that the parties to the proposed joint venture or merger are horizontal competitors (as is often the case), when the merged business subsequently implements the contemplated business plan, this misguided doctrine necessarily would result in *per se* condemnation of the unified business's future conduct.

In sum, the court of appeals' novel "*ex ante* agreement doctrine" contradicts this Court's decision in *Copperweld*, common sense, and sound antitrust policy. For all of these reasons, it should be soundly rejected by the Court. Judge Fernandez, writing in the dissent below, captured the nub of the issue when he aptly observed:

> In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?

PA 31a (Fernandez, J., dissenting).

B. The Court of Appeals Erroneously Held That A Joint Venture's Pricing Practices Can Be Condemned As *Per Se* Illegal

1. It Is Well-Settled That *Bona Fide* Joint Venture Conduct Is Subject To Rule Of Reason Analysis Under Section 1 Of The Sherman Act

As this Court has stated, while the "*per se* rule is a valid and useful tool of antitrust policy and enforcement . . . easy labels do not always supply ready answers." *Broad. Music, Inc.*, 441 U.S. at 8. This case illustrates an important corollary: erroneous labels supply equally erroneous answers.

Here, the court of appeals effectively assumed *a priori* that the petitioners' conduct was *per se* unlawful. This fallacious assumption is illustrated by the court's framing of the issue as whether there is "an exception to the *per se* prohibition on price fixing where two entities have established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands." PA 13a.

At the outset, it should be noted that the "issue" identified by the court of appeals is a non sequitur because, by definition, there are *no* exceptions to the *per se* rule. More to the point, the court of appeals turned the entire analysis on its head: it is well-settled that the rule of reason is the prevailing analytical formulation for assessing the legality of conduct under Section 1 of the Sherman Act. *See Cont'l T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)) (stating that the Court "has established the 'rule of reason' as the prevailing standard of analysis" under Section 1 of the Sherman Act). It is also well-settled that the *per se* analysis is confined strictly to those exceptional categories of conduct which have a "pernicious effect" on competition and

"lack . . . any redeeming virtue." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Moreover, it has been consistently held that joint ventures[6] are *not* included among those categories of conduct that are susceptible to condemnation under the *per se* rule:

> [C]ombinations, such as . . . joint ventures, . . . hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason: an inquiry into market power and market structure designed to assess the combination's actual effect.

Copperweld Corp., 467 U.S. at 768; *accord Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 117 (1984) (refusing to apply the *per se* rule to a horizontal restraint on price competition); *Broad. Music, Inc.*, 441 U.S. at 23; *United States v. Penn-Olin Chem. Co.*, 378 U.S. at 170. *See also Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996); *Polk Bros, Inc. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985); *Nat'l Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986); U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* § 1.2

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[6] The rule of reason governs not only the formation of joint ventures but also restraints that could plausibly contribute to the successful operation of any output enhancing cooperative arrangement, for the reasons explained in the *amicus* brief of Verizon Communications Inc.

(2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) [hereinafter "Joint Venture Guidelines"].[7]

Furthermore, in *Broadcast Music*, the Court held that the issue of licenses at pre-negotiated prices by participants in a legal joint venture does not constitute "price fixing" that is *per se* unlawful under the Sherman Act. 441 U.S. at 24. Rather than automatically declare pricing practices by joint ventures unlawful, the Court recognized:

> Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, *at least not as price-fixing schemes*, where the agreement on price is necessary to market the product at all.

Id. at 23 (emphasis added). Accordingly, joint ventures "should be subjected to a more discriminating examination under the rule of reason." *Id.* at 24.

The court of appeals in the case below departed from these well-settled precedents by holding that Equilon's price-setting practices, or the "*ex ante*" agreement between Shell

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[7] *See also, e.g.*, Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Geo. L.J. 1605, 1606-07 (1986); Richard W. Pogue, *Antitrust Considerations in Forming a Joint Venture*, 54 Antitrust L.J. 925, 927 (1985); ("[Joint ventures] can have substantial and direct procompetitive effects. . . . [J]oint ventures are devices that frequently achieve legitimate business advantages. . . ."); *see also* Howard H. Chang et al., *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223 (1998).

and Texaco authorizing Equilon to set prices, could constitute a *per se* violation of Section 1. In so doing, the court of appeals relegated Equilon's pricing practices, or the "*ex ante*" agreement authorizing Equilon to set prices, to that very narrow category of "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality – they are 'illegal *per se*.'" *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

This holding is erroneous on its face. Even taking the facts alleged by Respondents as true, there is no dispute concerning the legitimacy of the Equilon joint venture. As Judge Fernandez observed, Equilon is a "true, *bona fide*, economically integrated joint venture." PA 29a (Fernandez, J., dissenting). As such, Equilon's price-setting practices are necessarily subject to review under rule of reason analysis under *Broadcast Music* and the numerous precedents set forth above. The court of appeals' decision is a textbook example of the "overly simplistic and often overbroad" approach, which this Court cautioned against in *Broadcast Music*. 441 U.S. at 9. There, this Court thoughtfully observed: "When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* And yet, this is precisely what the court of appeals has held, and this holding should not be allowed to stand.

2. The Court Of Appeals Wrongly Relied On *Citizen Publishing Co. v. United States* As A Basis For Applying *Per Se* Analysis

The court of appeals wrongly relied on *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), as supporting legal authority for applying the *per se* analysis to the Equilon joint venture. The facts in *Citizen Publishing* are distinguishable from those alleged by the respondents and, in all events, *Citizen Publishing* does not stand for the

proposition that a joint venture may not set prices for its products consistent with Section 1 of the Sherman Act.

Unlike Equilon, the entity at issue in *Citizen Publishing* was not a fully integrated joint venture. Rather, *Citizen Publishing* addressed a "joint operating agreement" between the Star and the Citizen (the only two newspapers operating in the city of Tucson, Arizona) which combined the business operations of the papers, but did not integrate the competing papers themselves. *Citizen Publ'g Co.*, 394 U.S. at 133. Pursuant to the joint operating agreement, the newspapers retained control of their respective news and editorial departments, thereby maintaining apparent competition, while they jointly set uniform newsstand and subscription prices, as well as advertising rates. In contrast, Equilon consolidated all refining, manufacturing, distribution, sales, and marketing activities associated with their formerly competing products.

In sum, *Citizen Publishing* was not a decision involving a fully integrated joint venture. Rather, in *Citizen Publishing*, the Court unremarkably condemned a price-fixing agreement between two competing newspapers as a *per se* violation of Section 1 of the Sherman Act. In the context of joint venture analysis, however, even where the pricing practices of joint ventures might have been perceived as price fixing, this Court has declined to condemn them as *per se* unlawful and instead has ordered their review under the rule of reason. *Broad. Music, Inc.*, 441 U.S. at 22. Specifically, the Court held that "joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 1.

In sum, *Citizen Publishing* cannot be read to establish the *per se* rule as the prevailing legal standard in assessing the pricing practices of joint ventures, but that is essentially what

the Ninth Circuit has done. This Court should correct this fundamental error, and limit *Citizen Publishing* to its facts.

II. The Court of Appeals' Decision Compromises The Predictability Of The Legal Treatment of Joint Ventures And Is Detrimental To The Business Community and the U.S. Economy

Because it conflicts with a vast body of precedent from this Court and other courts of appeals, the Ninth Circuit's *per se* condemnation of the price setting practices of an integrated joint venture will undermine the predictability of the antitrust laws governing business associations in the United States. The decision below also will jeopardize the U.S. economy by deterring procompetitive economic activity, including the formation of joint ventures. Businesses of all sizes form joint ventures in the U.S. and internationally. Joint ventures, such as Equilon, "often add [competition] to the market." Indeed, joint ventures are unique because of their "capability in terms of new productive capacity, new technology, a n[e]w product, or entry into a new market." Thomas A. Piraino, *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1, 8 (1991) (citation omitted) [hereinafter Piraino, *Beyond Per Se*].

A. Joint Ventures Generate Efficiencies And Other Economic Benefits

Joint ventures encompass a wide variety of business associations in which firms work together to engage in legitimate business activities, such as marketing, production, research and development, distribution, sales, and purchasing. *See* Joint Venture Guidelines § 1.1.[8] Joint

[8] *See also* Comment and Hearings on Joint Venture Project, 62 Fed. Reg. 22,945 (Apr. 28, 1997) (defining "joint venture" as all (continued...)

ventures also form for a variety of pro-competitive purposes, including, for example, increasing efficiency, penetrating new markets, and accelerating innovation.[9]

Joint ventures generate efficiencies that otherwise would be unavailable through another economic form – namely, "going it alone" or fully merging. Therefore, creating a joint venture is often preferable to a merger. *See, e.g.*, Piraino, *Beyond Per Se*, 76 Minn. L. Rev. at 8.

A wide range of business associations can be classified as joint ventures – from loose contractual agreements to arrangements that are nearly as integrated as mergers. Piraino, *Beyond Per Se*, 76 Minn. L. Rev. at 2. Joint ventures, therefore, are one of the most flexible economic forms available to business. *See* Michael S. McFalls, *The Role and Assessment of Classical Market Power in Joint Venture Analysis*, 66 Antitrust L.J. 651 (1998); Rosabeth Moss Kanter, *Collaborative Advantage: The Art of Alliances*, Harv. Bus. Rev. 96-100 (Jul.-Aug. 1994).[10]

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collaborations short of a merger between actual or potential competitors in a relevant market).

[9] *See* David H. Kent, *Joint Ventures vs. Non-Joint Ventures: An Empirical Investigation*, 12 Strategic Mgmt. J., 387-93 (1991).

[10] *See also, e.g.*, Pankaj Ghemawat and Fariborz Ghadar, *The Dubious Logic of Global Megamergers*, Harv. Bus. Rev. 1 (Jul-Aug. 2000) (addressing the flexibility made available to businesses through joint ventures that is unavailable through mergers); Edward B. Roberts, *New Ventures for Corporate Growth*, Harv. Bus. Rev., 1, 2 (Jul.-Aug. 2000) (exploring various alternatives); David Ernst and Tammy Halevy, *Not by M&A Alone: Sometimes alliances make more sense than mergers or acquisitions*, The McKinsey Q., 2004:1, *available at* http://www.mckinseyquarterly.com (same).

Joint ventures are not a recent development. This Court has recognized that "joint ventures were utilized in ancient times . . . . [and] [t]heir economic significance has grown tremendously in the last score of years . . . ." *Penn-Olin Chem. Co.*, 378 U.S. at 169 . Since *Penn-Olin* was decided, joint ventures have only become more important and pervasive in the U.S. economy. One recent study noted that more than 5,000 joint ventures have been launched in just the past five years. James Bamford, David Ernst & David G. Fubini, *Launching A World-Class Joint Venture*, Harv. Bus. Rev. 1, 1 (Feb. 2004). These joint ventures can be found in virtually every sector of the economy. In the year 2000, the largest 100 joint ventures earned more than $350 billion in annual revenues. *Id.*

While these figures represent large joint ventures, they do not include joint ventures formed by small businesses. Commentators explain that small businesses are active joint venture participants.[11] Small business participation in joint ventures is further facilitated by the Small Business Administration, which actively seeks opportunities for small business involvement in joint ventures.[12]

In general, joint ventures, large and small, generate a variety of notable economic benefits:

- Joint Ventures Create More Jobs: Companies involved in joint ventures are disproportionately responsible for

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[11] *See* Marc J. Dollinger and Peggy A. Golden, *Interorganziational and Collective Strategies in Small Firms: Environmental Effects and Performance*, 18:4 J. of Mgmt. 695, 695-716 (1992); Marc J. Dollinger, *The Evolution of Collective Strategies in Fragmented Industries*, 15 Academy of Mgmt. Rev. 266, 266-85 (1990).

[12] For example, the Small Business Administration helps small businesses find form joint ventures and find opportunities. *See* http://usinfo.state.gov/products/pubs/oecon/chap4.htm.

new hiring. In a 2000 study, 81% of joint venture participants planned to hire new workers in the subsequent 12 months. Joint ventures hired nearly one-third more employees than non-joint ventures.[13]

- Joint Ventures Are Responsible For Increased Capital Investment: Joint venture participants are 58% more likely to make major new investments than are non-joint venture participants. Overall, 85% more capital will be invested by those in joint ventures. *See* n .11, *supra* . Significantly, joint ventures also facilitate investment in uncertain industries because of the ability to pool resources and spread risk.[14]

- Joint Ventures Invest More Broadly: "Compared to their counterparts on the sidelines, more CEOs involved in [joint ventures] are planning to increase spending in virtually all investment categories." *See* n.11, *supra.* Commentators agree that joint ventures can be instrumental in penetrating new markets. *See, e.g.*, Piraino, 76 Minn. L. Rev. at 8.

- Joint Ventures Are Prevalent Across Industry: 2000 data suggests that 36% of service companies participate in

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[13] PricewaterhouseCoopers, *Trendsetter Barometer: Joint Ventures Providing High Traction for America's Fastest Growing Companies and the Economy* (Nov. 6, 2000), *available at* http://www.barometersurveys.com (last visited Sept. 7, 2005). This study involved interviews of 421 CEOs of product and service companies identified in the media as the "fastest growing U.S. businesses" from 1995-2000. *Id.*

[14] "In fast-moving, highly uncertain industries, the market tends to prefer alliances to M&A." David Ernst and Tammy Halevy, The McKinsey Q., 2000 No. 4, at 2, available at http://www.mckinseyquarterly.com/article_print.aspx?L2=21&L3&ar=941.

joint ventures, while 29% of product companies participate. *See* n.12, *supra*.

- Joint Ventures Are Efficient: Companies involved in joint ventures expected to contribute 10.6% of their business assets to joint ventures in 2000, yet generate 12.0% of their revenue growth in return – with these revenue figures increasing in subsequent years. *See* n.12, *supra*.

- Joint Ventures Enable Small Businesses to Compete Effectively With Larger Concerns: Cooperative strategies reduce uncertainty for small firms and improve their sales performance. *See* n.12, *supra*.

- Joint Ventures Create Value for Shareholders: One study, based on a sample of 253 announcements of joint ventures involving publicly traded companies, found that "[t]he stock market reacts positively to joint ventures that involve pooling of complementary resources.... Small firms that enter into joint ventures with larger firms earn significant positive abnormal returns, because the joint ventures act[] [as] signals of the small firm's value."[15]

B. Joint Ventures Are Encouraged By The Courts And Federal Antitrust Agencies

The widespread use of joint ventures has been facilitated by judicial decisions and federal agency policies, which have

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[15] *See* Partha Mohanram and Anish Nanda, *When do Joint Ventures Create Value?* Harv. Bus. Sch. Working Paper (Feb. 1998). This study concluded that the stock market rewarded alliances much more richly in electronics, media, and software (nearly three-fourths of the media and entertainment alliance announcements raised the announcing company's stock price by more than one standard deviation), compared with just 53 percent of the acquiring companies in M&A transactions.

established the well-settled legal principle that fully-integrated, legitimate joint ventures will not be summarily condemned under the antitrust laws. This principle provides stability and necessary legal guidance for companies participating in joint ventures. The court of appeals' decision radically departs from this precedent, to the detriment of the entire business community.

As noted above, following the consistent guidance of this Court in joint venture cases, lower courts have uniformly applied the rule of reason in assessing the legality of conduct under Section 1 of the Sherman Act. *See supra* p. 11 (collecting cases).

The DOJ and FTC have likewise accepted this Court's guidance and developed policies that encourage the use of procompetitive joint ventures. The agencies' approach is best illustrated by their Joint Venture Guidelines, which make clear that legitimate joint ventures should be analyzed under the rule of reason. *See* Joint Venture Guidelines § 1.2. Indeed, where, as here, a fully integrated joint venture is under analysis, the Joint Venture Guidelines expressly state that the venture should be subjected to a full merger analysis. *Id.* The predicate for this analysis is the agencies' recognition of the undisputable fact that legitimate joint ventures can promote competition, output, and innovation regardless of whether the joint venture was created to promote efficiency or create a new product. *See id.* at 4.

In view of the consistent guidance supplied by these judicial precedents and agency enforcement policy, there is widespread consensus among legal commentators that where a joint venture is challenged under the antitrust laws, the rule of reason will be applied. *See, e.g.*, XIII Herbert Hovenkamp, Antitrust Law ¶ 2121b, at 126-27 (2d ed. 2005); 2 Eleanor M. Fox & Byron R. Fox, Corporate Acquisitions and Mergers § 21.10, at 21-46 ("Joint ventures are not illegal per se . . . . The antitrust laws reprehend joint

ventures only if they are anticompetitive in essence or are accompanied by unreasonable collateral restraints on parties to the joint venture or unreasonable exclusion from the joint venture or its facilities of outside parties."); 13 Zolman Cavitch, Business Organizations With Tax Planning, § 172.04[2], 172-103 (2003) ("[T]he principal mode of antitrust analysis for evaluating the legality of a joint venture has been essentially the same as that used for a merger or acquisition.").

The court of appeals' decision demonstrates a wholesale disregard of sound antitrust analysis as developed by the courts and the federal antitrust agencies. If this decision is allowed to stand, it will seriously undermine the business community's ability to rely on these well-settled legal principles, and, by expanding the reach of the *per se* rule in unprecedented fashion, it will create unwarranted uncertainty for the business community. In such an uncertain environment, joint ventures are less likely to form or operate, potentially stifling competition, growth, and innovation in every sector of the United States economy.

This Court should reaffirm to the business community that the conduct of legitimately formed joint ventures is subject to antitrust analysis under the rule of reason and cannot be condemned as *per se* illegal.

CONCLUSION

The decision of the court of appeals for the Ninth Circuit should be reversed.

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In The
Supreme Court of the United States

TEXACO INC., *et al.*,

Petitioners,

vs.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

vs.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF NORTHWEST OHIO PHYSICIAN SPECIALISTS COOPERATIVE, LLC IN SUPPORT OF PETITIONERS TEXACO INC., *ET AL.*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF NORTHWEST OHIO SPECIALISTS COOPERATIVE, LLC IN SUPPORT OF PETITIONERS TEXACO INC., *ET AL.*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Northwest Ohio Specialists Cooperative, LLC ("NWOS") respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of Petitioners.

Petitioners Texaco Inc. and Shell Oil Company have given consent to the filing of this *amicus* brief. However, counsel for respondents has refused all requests for consent to the filing of *amicus* briefs.

Amicus NWOS is an administrative association of 18 physician groups in different specialties including cardiology, ENT, neurosurgery, urology and orthopedics.

Like the majority of the nearly 600,000 physicians in the United States, NWOS physicians practice in small groups. Thus, they, like other physicians and other health care providers, can proactively participate in innovative efforts to provide better patient care more cost effectively only through what antitrust law terms "joint ventures."

However, as this case vividly illustrates, antitrust joint venture law applied by the court below here and by many others is so unclear, uncertain, risky and expensive to evaluate in the planning and operations stages, let alone defending in court, that many physicians as a practical matter simply cannot risk or afford to participate in or lead the many innovative ventures that health care in the U.S. so desperately needs. Joint ventures can succeed as businesses only with agreements on prices for

customers externally, and with agreements on prices internally with suppliers including providers within the joint ventures.

The formalistic view of *per se* price-fixing by the court below ignores this Court's recent hard work and precedent, as well as sound public policy. This case thus presents a crucial opportunity for the Court to provide the antitrust guidance on joint ventures that the health care field and the Nation so urgently need.

Accordingly, *amicus* respectfully requests leave to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether it is *per se* illegal concerted action under Section I of the Sherman Act for an economically integrated joint venture to set the selling price of its own products.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF *AMICI*	1
ARGUMENT	2
I. Joint Ventures Are Now a Vital Form of Doing Business for U.S. Companies and Workers in Today's Global Economy in General, and for Health Care In Particular, and Urgently Need Much Clearer Antitrust Guidance	2
II. The Court Below's Decision Includes Two Fundamental Errors Requiring Reversal and Invites Much Needed Guidance on Antitrust Joint Venture Law	8
A. This Court's *California Dental* and *Cracking Oil* Decisions Are Controlling Here and Provide the Clear and Elegant Antitrust Guidance Long Needed for Beneficial Joint Ventures to Flourish Without the Chilling Effect of *Per Se* Exposure, While Preserving the *Per Se* Rule for "Naked" Restraints of Trade	8
B. The Court Below Erred By Assuming Price-Setting Had *Per Se* Price-Fixing Effects Sufficient to Establish The "Naked" Restraint Element of a *Per Se* Theory	15
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES:

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 8

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Chicago Bd. of Trade v. U.S., 246 U.S. 231 (1918) 10

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) 13

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Dagher v. Saudi Refining Inc., 369 F.3d 1108 (9th Cir. 2004) 5, 6, 16, 17, 20

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TABLE OF AUTHORITIES – Continued

Page

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Pitofsky, "A Framework for Antitrust Analysis of Joint Ventures," 74 *Georgetown L. Rev.* 1605 (1986) 5

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Porter & Teisberg, "Redefining Competition in Health Care," *Harvard Business Review* 65 (June 2004) 5

INTEREST OF *AMICUS*[1]

Amicus NWOS is an administrative association of 18 physician groups in different specialties including cardiology, ENT, neurosurgery, urology and orthopedics.

Like the majority of the nearly 600,000 physicians in the United States, *amicus* NWOS' affiliated physicians practice in small groups. Thus, they, like other physicians and other health care providers, can proactively participate in innovative efforts to provide better patient care more cost effectively only through what antitrust law terms "joint ventures."

However, as this case vividly illustrates, antitrust joint venture law applied by the court below here and by many others is so unclear, uncertain, risky and expensive to evaluate in the planning and operations stages, let alone defending in court, that many physicians as a practical matter simply cannot risk or afford to participate in or lead the many innovative ventures that health care in the U.S. so desperately needs. Joint ventures can succeed as businesses only with agreements on prices for customers externally, and with agreements on prices internally with suppliers including providers within the joint ventures.

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[1] Petitioners Texaco Inc. and Shell Oil Company have given consent to the filing of this *amicus* brief. However, counsel for respondents has refused all requests for consent to the filing of *amicus* briefs.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The formalistic view of *per se* price-fixing by the court below in this case ignores this Court's recent hard work, precedent and sound public policy. It thus presents a crucial opportunity for the Court to provide the antitrust guidance on joint ventures that the health care field and the Nation so urgently need.

ARGUMENT

I. Joint Ventures Are Now a Vital Form of Doing Business for U.S. Companies and Workers in Today's Global Economy in General, and for Health Care In Particular, and Urgently Need Much Clearer Antitrust Guidance.

The emergence of joint ventures as a vital and economically advantageous form of business entity, in the United States and worldwide, is widely recognized. Joint ventures in the antitrust sense of the term – business "relationships that are not based on *ownership* but on *partnership*" – have become an essential form of doing business in the U.S. and around the world. This central fact of economic development has had wide-ranging implications for the organization of businesses, and it likewise has important implications for the evolution and articulation of federal antitrust doctrine. This case provides the occasion for the Court to undertake this crucial effort.

The importance, indeed, the urgency of new and clear antitrust guidance for joint ventures flows from the economic and technological imperatives that have made them such a powerful emergent economic form. Peter

Drucker, the "preeminent management thinker of our time", explains incisively:[2]

> [T]he trend toward alliances of this sort in which nobody has control – that is, the trend toward partnerships – is accelerating. One reason is that no one company, not even the telephone giants, has enough money to swing the deal alone. A more important reason is that no one company by itself has the needed technology. And in many parts of the world, especially in "emerging countries" like coastal China or Malaysia, business cannot be done except through a joint venture or an alliance with a local partner. "Today," the CEO of a major pharmaceutical company said recently, . . . "[it] is simply impossible for us – and we are among the world's research leaders – to have enough scientific expertise in *all* the new fields. It is equally impossible for us – and we pride ourselves on our marketing organization – to serve all the new channels through which health care products will be marketed as the health care systems of the world are reengineering themselves."

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[2] "Peter Drucker on the New Business Realities," in Symposium: New Foundations For Joint Ventures and Antitrust, 44 *Antitrust Bulletin* 787, 799 (1999) (C. Weller Guest Editor). E.g., there are hundreds of joint ventures in the auto industry world-wide, including the GM-Toyota joint venture. See "Ward's Automotive 'Spider Chart'" & Hogan, "The General Motors-Toyota Joint Venture: A General Motors Perspective," Symposium *supra*, 44 *Antitrust Bulletin* at 791-93, 821-40. Peter Drucker has been described as "the preeminent management thinker of our time" by Theodore Levitt, a former Editor of the *Harvard Business Review*, quoted in Bennett, "Management Guru," *Wall Street J.*, at A-1 (July 28, 1987).

The Federal Trade Commission recognized these powerful forces in 1996, reporting that "Global and innovation-based competition is driving firms toward ever more complex collaborative agreements."[3]

These trends, and the accompanying urgent need for refined antitrust doctrine, are particularly pronounced in the economic realm in which NWOS operates: health care. The convergence, within this realm, of myriad economic pressures, technological innovation, and the need for innovation and reform make it a singular, and singularly important area for clear and sophisticated antitrust analysis.

To be sure, as everybody knows, the nation's health care system needs major innovation and reform. The reality and continuing prospect of radical technological innovation carries with it at once great promise and tremendous cost, the kinds of astronomical cost that fall squarely within the rationale advanced by Drucker.

Further, the health care marketplace is characterized by exceptional dispersal of the crucial economic actors. The majority of the nation's 600,000 practicing physicians practice as solo-practitioners or in small groups. And there are tens of thousands of hospitals, pharmacies and other providers, insurers, reinsurer, and other crucial actors. This vast and diverse structure increasingly demands that the participants form joint ventures if they are to participate (and compete) successfully in the world of health care, and keep pace with the ever-increasing demands for

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[3] FTC, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Vol. I, Chap. 10, "Joint Ventures," at 1 (1996).

innovation and reform. Yet the most routine economic analysis suggests that these vital health care actors will participate in this ongoing evolution, which is so urgently needed, only if the antitrust doctrines applicable to joint ventures are sufficiently clear and well defined to provide reasonably reliable guidance. This case provides the opportunity for the articulation of such guidance through the correction of the doctrinal errors of the appellate court.

The time for such guidance is particularly ripe. A year ago, a new model for health care was fashioned, based on intensive study of the particular market dynamics affecting health care. The study concluded that private competition in health care, if re-directed from insurance ("health plans, networks and hospital groups") to health care (the "prevention, diagnosis, and treatment of individual health conditions or co-occurring conditions of patients"), can produce "stunning gains in quality and efficiency."[4] Of course, the vibrancy of this model depends on, among other things, physicians and other crucial actors being able to operate within a regime of antitrust joint venture law that acknowledges and accommodates the particular demands of the health care marketplace.

The need for this evolution in antitrust law is acute. Antitrust analysts are "all but unanimous that *per se* rules are inappropriate for joint venture analysis" because, unlike "cartels, joint ventures are devices that frequently achieve legitimate business advantages."[5] But, as *Dagher*[6]

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[4] Porter & Teisberg, "Redefining Competition in Health Care," *Harvard Business Review* 65, 66 (June 2004).

[5] Pitofsky, "A Framework for Antitrust Analysis of Joint Ventures," 74 *Georgetown L. Rev.* 1605, 1621 (1986).

[6] *Dagher v. Saudi Refining Inc.*, 369 F.3d 1108 (9th Cir. 2004).

poignantly illustrates, "joint ventures receive a more hostile reception in the agencies and courts" than do mergers.[7] The "case law and enforcement policies applied to joint ventures" is "incoherent[] and inconsistent[]," and is, frankly, a "mystery shrouded in a riddle wrapped in an enigma."[8]

These doctrinal shortcomings are manifest in this case, in which the record demonstrates overwhelmingly that the challenged joint ventures were not the product of ravenous economic malfeasance but, rather, were economically sound and necessary responses to changing market conditions. The joint ventures in this case are supported by, among other things, a "voluminous record documenting the economic justifications for creating the joint ventures," including annual savings of $800 million. The "Federal Trade Commission and several State Attorneys General [had] approved the formation of the joint ventures" (with modifications), and the joint ventures included "the collective assumption of risk and resource pooling."[9]

Yet the important and productive economic innovation reflected in Petitioners' joint ventures faces massive economic exposure. Unless the appellate decision is reversed, the joint venturers will face trial in a class action by 23,000 service stations that will proceed, not under a sophisticated and sensible body of antitrust law, but on a formalistic *per se* price-fixing theory with mechanistic jury

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[7] Gellhorn & Miller, "Competitor Collaboration Guidelines – A Recommendation," 42 *Antitrust Bulletin* 851, 854 (1997).

[8] November 2, 1984 J. Paul McGrath remarks, 18th Annual New England Antitrust Conference, 5 *CCH Trade Reg. Rep.* ¶ 50,470, at 56,137 (borrowing the words of Winston Churchill).

[9] 369 F.3d at 1111-12.

instructions used as "gospel" for many years.[10] And, incredibly, the defendants will have no chance to provide evidence to the jury on the actual markets affected by the joint ventures, the manner in which the joint ventures compete, or the effects of the joint venture on competition, efficiencies, quality, or prices to consumers. Indeed, they will have no opportunity to contest the "naked" restraint element of a *per se* theory, which the court below ruled should be taken from the jury.

The prospect of this case proceeding to trial under the rulings announced by the court below is harrowing for the litigants. But, worse, those rulings, if permitted to stand, will have far-reaching and deleterious effects in an inconceivably wide range of settings, indeed, in economic and market settings ranging far beyond those affecting the Petitioners and NWOS. Thus this Court's careful consideration of the broad social and economic implications of the issues in this case should lead the Court to reverse the court below. This reversal should correct the two fundamental errors raised by the Question Presented. Further, the Court should take this opportunity to provide clear, refined antitrust guidance for the courts, innovators, business, physicians, other health care providers, antitrust agencies, and antitrust practitioners.

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[10] See, e.g., ABA, *Model Jury Instructions In Civil Antitrust Cases 2005 Edition* (2005); at B-19 to 21 ("Plaintiff claims that it was injured because defendants conspired to fix the prices for [*product* X]. Under the Sherman Act it is illegal for competitors, regardless of their size or amount of sales, to agree on the prices to be charged for their competing products . . .). The "gospel" observation is made by a past Chair of the ABA Antitrust Section, at xiv.

The following section of this brief demonstrates the errors of the court below. Section II.A shows the court below applied the wrong standard for the "naked" restraint element of a *per se* theory, which is now controlled by this Courts decision in *California Dental v. FTC.*[11] Section II.B analyzes the lower court's erroneous view, which blurred distinct elements and assumed that proof of price setting is sufficient to establish the "naked" restraint element of a *per se* antitrust violation.

II. The Court Below's Decision Includes Two Fundamental Errors Requiring Reversal and Invites Much Needed Guidance on Antitrust Joint Venture Law.

A. This Court's *California Dental* and *Cracking Oil* Decisions Are Controlling Here and Provide the Clear and Elegant Antitrust Guidance Long Needed for Beneficial Joint Ventures to Flourish Without the Chilling Effect of *Per Se* Exposure, While Preserving the *Per Se* Rule for "Naked" Restraints of Trade.

California Dental is controlling here. *California Dental* is a sea-change advance in antitrust analysis by the Court after 22 years of refining the law on *per se* and "quick look" presumption theories that started with *GTE Sylvania.*[12] The Court in *California Dental* significantly

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[11] *Calif. Dental Assn. v. FTC*, 143 L. Ed. 2d 935 (1999).

[12] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). See also *NYNEX Corp. v. Discon, Inc.*, 142 L. Ed. 2d 510 (1998); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *NCAA v. University of Oklahoma*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

advanced and refined antitrust doctrine by adopting a fact- and market-focused analysis instead of the shop-worn and mechanistic verbal formalism that has dominated antitrust analysis since Justice Douglas' Footnote 59 in *Socony-Vacuum Oil*[13] in 1940.

In *California Dental*, as here, the "very issue at the threshold of this case" was whether the price restraints at issue are "sufficiently verifiable in theory and in fact to fall within such a general rule" – the general theory in each case being one presuming net anticompetitive effects (a "quick look" theory there, a *per se* theory here). *Id.* at 951. Justice Souter elaborated in a footnote how *California Dental* was a fundamental break from the antitrust analysis of the past.[14]

The Court's new antitrust analysis is directly supported by, and is fundamentally similar to, an often overlooked but crucial precedent in this Court: Justice

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[13] *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 n. 59 (1940) (this footnote is used in jury instructions and otherwise to define *per se* price-fixing to this day, that is, a "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing . . . price" is "illegal *per se*"). See, e.g., ABA, *Model Jury Instructions In Civil Antitrust Cases 2005 Edition* (2005), at B-19 to B-21; ABA, *Sample Jury Instructions in Civil Cases* B-16 (1999).

[14] "The absence of any empirical evidence on this point indicates that the question was not answered, merely avoided by implicit burden-shifting of the kind accepted by JUSTICE BREYER. The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do." *Id.* at 953-54 n. 12.

Brandeis' Final Rule of Reason opinion in *Cracking Oil*[15] in 1931. As Milton Handler explained in his classic article "The Judicial Architects of the Rule of Reason,"[16] Justice Brandeis required "'a definite factual showing'" with "definite content" in antitrust analysis, and his "precise mind recoiled" from "elusive and question-begging epithets" such as "Peckham's 'direct and indirect dichotomy,'" and "White's 'undue limitations on competitive conditions.'"[17]

Justice Brandeis in *Cracking Oil* and the Court in *California Dental* take the same basic approach to antitrust analysis, requiring "'a definite factual showing'" with "definite content," and eschewing "elusive and question-begging" words like today's "ancillary restraints," "reasonably necessary," "essentiality" and "economic integration" formalisms.

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[15] *Standard Oil of Indiana v. U.S.*, 283 U.S. 163 (1931).

[16] In M. Handler, *Twenty Five Years of Antitrust* 1, 30 (1973). Justice Brandeis' First Rule of Reason opinion, *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231 (1918) is well-known, but his Final Rule of Reason opinion, *Cracking Oil in 1931*, although little known, is still valid precedent and provides the sophisticated next generation Rule of Reason analysis *California Dental* requires. Remarkably, it is also fundamentally the same method as the new and different economic theory based on innovation and productivity, not efficiency theory that is static and "dangerously incomplete," developed by Harvard's Michael Porter. See Porter, Staudhammer, Stern & Weller, Ed., *Unique Value: Competition Based on Innovation Creating Unique Value* (2004) (Prof. Porter Chaps. 2-6, Weller Chaps. 1, 7 on *California Dental* and this new *California Dental-Cracking Oil*-Porter Rule of Reason and economic theory).

[17] Handler, "The Judicial Architects of the Rule of Reason," *supra*, at 29, quoting *Cracking Oil*, 283 U.S. at 179.

The court below misread or ignored *California Dental*.[18] Its analysis instead is dominated, and doomed, by these old verbal formalisms that are no longer part of antitrust joint venture law.

At issue in *California Dental* were alleged price restraints by a dental association that the FTC ruled unlawful, using a "quick look" presumption theory. This Court vacated the Ninth Circuit's decision because the Court of Appeals "did not scrutinize the assumption of relative anticompetitive tendencies." This Court held that a "quick look" presumption can be used only in sharply limited circumstances, for instance, when the "likelihood of anticompetitive effects" are "intuitively obvious," and "easily ascertained," and where there are no "plausible explanations of neutral or procompetitive effects." In contrast, "quick look" presumptions are inappropriate in "somewhat complex," settings. And, in all events, an antitrust plaintiff's claims of anticompetitive effects must be based on sound theoretical and factual evidence because "assumption alone will not do." *Id.* at 951-54 n. 12.

The *California Dental* standards for "quick look" rebuttable presumption theories apply *a fortiori* to *per se* theories because they are conclusive presumptions. Moreover, *California Dental* provides a simple yet elegant legal standard, now controlling, for determining the "naked" restraint element of a *per se* theory.[19] This standard is, of

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[18] The court below relegated *California Dental* to a short footnote only discussing plaintiffs' "quick look" rebuttable presumption theory, missing completely its implications for *per se* conclusive presumption theories. *Id.* at 1116 n. 7.

[19] The court below recognized these two elements of a *per se* theory, whether the restraint is "naked," and whether the restraint is a type of

(Continued on following page)

course, dependent on context, in this instance a context limited by three crucial points.

First, the Court in *Business Electronics* set the stage by making clear that the use of *per se* theories is the exception, not the rule. In the Court's word's, "there is a presumption in favor of a rule-of-reason standard." Further, "departure from that standard [such as the departure entailed in *per se* theories] must be justified by demonstrable economic effect" such as a demonstration of "the facilitation of cartelizing." It cannot be justified by "formalistic distinctions."[20]

Second, the archetypical "naked" restraint is a cartel. "Cartels are neither easy to form nor easy to maintain," this Court has wisely observed, as "[u]ncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier."[21] Thus cartels are "easily ascertained" with discovery, are not "complex", and their anticompetitive effects are "intuitively obvious." Whatever camouflage a cartel may try to use, discovery will reveal much evidence of what is really going on because cartels require a lot of work to succeed. Thus the phrase "naked"

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per se price-fixing, see, e.g., *id.* at 1118, 1119-24, but used the wrong standard for the "naked" restraint element.

[20] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988).

[21] *Id. California Dental* elaborates on the "demonstrable economic effect" requirement stating that "a theoretical claim of anticompetitive effects" requires proof of both the "theoretical basis for the anticompetitive effects" and of "whether the effects actually are anticompetitive." 143 L. Ed. 2d at 953-54 n. 12.

restraint was carefully chosen, a verbal picture that is consonant with the economic reality being described.

Third, the scope of "naked" restraint analysis is highly constricted, and therefore is applicable only under the narrow conditions for which it was designed: cartels and similarly flagrant endeavors. The relevant evidence for determining the "naked" restraint element is largely limited to the internal operations of defendant(s), avoiding extensive evidence of the reality of the markets involved or of actual market effects. This deliberate avoidance of economic evidence must be exercised with great caution, because of the inherent danger of evaluating antitrust issues without attention to the ultimate issue of the impact on competition in the markets in which the business operates.

These specific limitations are soundly addressed in *California Dental*. Joint price-setting by competitors, or any other restraint by competitors and others, is a "naked" restraint if and only if:

> (1) the anticompetitive effects of the restraint are easily ascertained or obvious in the markets alleged to be affected, and sufficiently verified in theory and in fact, and
>
> (2) there is no plausible reason why the restraint has a net procompetitive effect or is competitively neutral in the markets alleged to be affected.

The new *California Dental* standard for "naked" restraints readily distinguishes *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), a case at the heart of the analysis by the court below, and, indeed, at the heart of Respondent's case. *Citizen Publishing* involved a cartel

by the only two local newspapers with 100% of the affected markets. The anticompetitive effects of the joint-pricing restraint were obvious and easily ascertained. Further, there was no plausible reason why joint pricing by the only two newspapers in town could have a net procompetitive effect or be competitively neutral. Thus, "naked" restraint *per se* analysis was appropriate.

Here, in contrast, the Petitioners' joint ventures established new businesses and set prices for those businesses they were in. They did so as partners, as they would have done following a merger. Of course, a business must set prices; that's part of being in business, of participating in the marketplace, and of conducting commerce. The idea that setting a price for one's product can itself constitute a *per se* violation in such a setting is a perfect example of the illogic of mechanically applying the *per se* rule to joint ventures.

The actual anticompetitive effects of the alleged pricing restraint cannot be easily ascertained and are not obvious, making clear the inapplicability of "naked" restraint principles. Likewise, those principles led the court below to view as irrelevant the fact that Petitioners' joint ventures produced annual savings of $800 million, a fact that even in the most cursory thinking would constitute a very plausible reason why the joint ventures were procompetitive, or, at worst, competitively neutral.

Any antitrust doctrine that leads to the conclusion that these crucial economic facts are irrelevant lacks a certain refinement. But the problem is not with existing doctrine, as this Court has made clear in *California Dental*. Rather, the problem is reflected in the decision of

the lower court, its ignorance of or inattention to *California Dental,* and its rigid adherence to outmoded principles.

B. The Court Below Erred By Assuming Price-Setting Had *Per Se* Price-Fixing Effects Sufficient to Establish The "Naked" Restraint Element of a *Per Se* Theory

The court below also erred by blurring two distinct elements of the requisite proof of a *per se* violation. It did so by assuming that proof of *per se* price-fixing effects (the second element) is sufficient to establish the "naked" restraint element (the first element).

The reversed "logic" of the court below is facially silly. If the activity of setting a price were itself sufficient to establish the crucial element of "naked" restraint, then all joint selling ventures would be illegal price-fixers. That is why the doctrine requires, *first*, proof of a "naked" restraint, and then, and only then, proof of *per se* type price-fixing.

A joint venture, like any other business, is a business that must set prices for its products and services, decide how much to pay its members and other input costs, determine how it will beat its competitors in the markets it serves, seek profits high enough to support innovation, satisfy its future business needs, and satisfy its investors.[22] These internal business decisions are logically irrelevant to the "naked" restraint element of a *per se* theory. And,

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[22] On joint ventures as businesses, see, e.g., Bamford, Ernst & Fubini, "Launching a World-Class Joint Venture," *Harvard Bus. Rev.* (Feb. 2004).

under the *California Dental* standard, they are treated as irrelevant.

As Judge Fernandez, in his *Dagher* dissent, explained clearly, at 1127:

> In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?

He then elaborated, with a telling story:

> We now have an exotic beast, no less strange than a manticore, roaming the business world. This beast would otherwise be a true business, but when it acts like a true business – sets prices for its own goods – it subjects its otherwise insulated members to the severe sting of antitrust liability. While it has the head of a business man and the body of an entrepreneurial lion, it has the tail of a liability scorpion. I suppose I am as taken with stories of exotic beasts as the next person, but I prefer to leave them in the realm of the unknown; I would rather not confront them in the marketplace.

The majority in the court below ignored these common-sense observations, opting instead for circular reasoning. As the majority below saw it, the "uniform pricing scheme" was a "naked" restraint; in the inflamed words of the opinion, an "abomina[ble] . . . agreement to fix prices."

In short, the court below concluded that the Petitioners' decision to set a price for their product was *per se* price-fixing and therefore a "naked" restraint. The mischief of this grievous logical flaw is clear and this case provides a perfect opportunity to rectify the flaw, and clarify antitrust law.

In the course of clarifying the crucial distinction between the "naked" restraint and *per se* price-fixing elements of antitrust law, this Court should clarify that the elements stand separately, and require separate and legally sufficient proof. The decision of the court below not only blurred this distinction analytically, it compounded the error by treating the issue of whether an alleged restraint is "naked" as an issue of law, to be decided by the court even when the record contains disputed facts.[23]

Of course, such an error has serious constitutional implications, infringing as it does on the right to trial by jury and the right to due process. In antitrust specifically, it is well-settled but often confused that it is a jury question when the facts on the "naked" restraint element are disputed. For example, the 2005 Edition of the ABA's *Model Jury Instructions In Civil Antitrust Cases* states that when "the determination as to whether a pricing agreement is naked . . . involves a question of fact, this [jury] instruction should be provided."[24]

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[23] *Dagher*, at 1122.

[24] ABA, *Model Jury Instructions In Civil Antitrust Cases 2005 Edition* (2005), at B-24. See, e.g., *U.S. v. Gaudin*, 115 S. Ct. 2310, 2320 (1995).

In the course of rectifying the error below, and disentangling the elements of "naked" restraint and price-fixing, this Court should make clear that whenever there are genuine issues of fact or contested issues that blend law and fact, the law requires that these issues be submitted to the jury. Antitrust defendants have a constitutional right to jury trials on the "naked" restraint element. And, given the widespread confusion and misunderstanding in antitrust on this jury trial issue, the Court's opinion should make clear that antitrust jury instructions on *per se* theories should include a distinct "naked" restraint element.[25]

In summary, 20 years ago Prof. Areeda in effect wrote that Judge Fernandez' dissenting analysis in this case quoted above was absolutely correct. Specifically, Prof. Areeda wrote that joint selling ventures by two competitors, like Petitioners' joint ventures here, that jointly fix selling prices and eliminate competition between the two competitors is not "the kind of conduct that we want to discourage with bright-line prohibition," and that "no one [should] believe[ ] that they violate the per se rule against 'price fixing.'"[26]

> Virtually all horizontal agreements among competitors ultimately affect price. * * * Suppose, for example, that two small producers, *A* and *B*, in a highly competitive market form a joint venture partnership, *C*, to realize economies of scale in purchasing a component or in selling the finished

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[25] The ABA *Model Jury Instructions In Civil Antitrust Cases 2005 Edition* illustrates the common practice not to include the "naked" restraint element as a distinct element in *per se* theory jury instructions. See, e.g., *id.* at B-24 to B-56.

[26] P. Areeda, VII *Antitrust Law* ¶1510c at 422 (1986) (footnotes omitted).

> product. Assume that *C* negotiates the buying or selling price with suppliers or customers. In every ordinary sense, *A* and *B* are jointly fixing their buying or selling price; competition between them on the buying or selling side of the market is eliminated. Yet no one believes that they violate the per se rule against "price fixing." The obvious explanation is that the rationale of the per se rule does not apply. Joint selling (or buying) ventures are not always or almost always pernicious. Indeed, they are not pernicious at all in the absence of market power. * * * Nor is this the kind of conduct that we want to discourage with bright-line prohibition. To be sure, there may be administrative difficulties in appraising it, but that is never a sufficient basis for categorical prohibition.

Unfortunately, as this case illustrates, the exact opposite is nearly true. The court below, many courts and many others believe that joint ventures among competitors that set the price for the products and services the joint venture is marketing is "naked" price-fixing.

Now, more than ever, for the American economy in general, and health care in particular, it is time to make Prof. Areeda's academic vision legal reality for joint ventures.

CONCLUSION

The court below's decision in *Dagher* should be vacated and the Court should provide clear and refined guidance for all on the application of antitrust law to joint ventures.

Respectfully submitted,

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TEXACO, INC.,
Petitioner,
v.
FOUAD N. DAGHER, *et al.*,
Respondents.

SHELL OIL COMPANY,
Petitioner,
v.
FOUAD N. DAGHER, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RETAIL INDUSTRY LEADERS ASSOCIATION AND THE FOOD MARKETING INSTITUTE AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. SECTION 1 PROPERLY APPLIES TO JOINT VENTURES 10

II. *COPPERWELD* SHOULD NOT BE EXTENDED TO JOINT VENTURE CONDUCT 13

III. CONGRESSIONAL INTENT DEMONSTRATES THAT JOINT VENTURES SHOULD BE SCRUTINIZED UNDER SECTION 1 17

IV. EXTENDING THE SINGLE ENTITY DOCTRINE TO JOINT VENTURES WOULD CREATE AN UNWARRANTED SAFE HARBOR FOR MOST JOINT VENTURE RESTRAINTS 18

V. THIS DECISION SHOULD BE LIMITED TO THE QUESTION PRESENTED 24

CONCLUSION 25

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Page

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v. Visa U.S.A., Inc.,
779 F.2d 592 (11th Cir. 1986) 22, 23

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468 U.S. 85 (1984) 10, 11

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v. United States Drug Enforcement Admin.,
362 F.3d 786 (D.C. Cir. 2004) 9

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34 F.3d 1091 (1st Cir. 1994) 15

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341 U.S. 593 (1951) 6, 10, 11

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BRIEF OF *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICI*

Amici, The Retail Industry Leaders Association ("RILA") and The Food Marketing Institute ("FMI"), are trade associations that collectively represent thousands of merchants. RILA and FMI members collaborate in pro-competitive joint ventures and purchase products and services from joint ventures, including credit, debit and commercial card services from the Visa and MasterCard joint ventures.[1]

RILA is the world's leading alliance of fastest-growing and innovative retailers and their product and service suppliers. RILA members represent more than $1 trillion in sales annually and operate more than 100,000 stores, manufacturing facilities and distribution centers nationwide. Its member retailers and suppliers have facilities in all 50 states, and they employ millions of Americans.

FMI conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies — supermarkets and grocery wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 grocery stores in the United States. FMI's membership ranges from small, independent supermarkets to mid-sized regional firms to large supermarket chains.

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1. This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici*. Petitioners and respondents have consented to the filing of this brief by the accompanying letters filed with the Clerk.

RILA and FMI have significant and unique interests in this case. Their members have benefited from the antitrust laws' solicitude towards procompetitive joint ventures by entering into such collaborations. And their members and customers have experienced firsthand how joint ventures can be exploited for anticompetitive purposes. For this reason, RILA and FMI have a strong interest in maintaining the proper balance between enforcing the antitrust laws and encouraging procompetitive joint ventures, while at the same using Section 1 of the Sherman Act, 15 U.S.C. § 1, to protect against their exploitation for anticompetitive purposes.

RILA and FMI's interest in this action has been heightened by the fact that Visa (along with The Coca-Cola Company and Microsoft Corporation) has submitted a brief, as *amicus*, advocating the extension of the single-entity doctrine to post-formation joint venture conduct. Visa is advocating this position to immunize from Section 1 challenge its practice of collectively fixing with Visa owner/member banks the interchange prices that they charge for every Visa credit, debit and commercial card transaction in the United States. Visa acknowledges in footnote 9 of its brief that this issue was not raised in this appeal. RILA and FMI members and their customers, which must accept Visa and MasterCard's dominant payment cards to remain competitive, are forced to pay these fixed and supra-competitive fees on every Visa (and MasterCard) credit, debit and commercial card transaction that they accept.

Merchants have filed antitrust lawsuits to address this abuse of Visa and MasterCard's substantial market power. At least 39 actions,[2] many of which are putative class actions,

2. These actions include *Kendall d/b/a Bala Hair Salon v. Visa U.S.A. Inc.*, No. 04-CV-4276 (JSW) (N.D. Cal. filed Oct. 8, 2004 and dismissed on July 25, 2005 without leave to amend) (class action (Cont'd)

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complaint); *Animal Land, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-1210 (N.D. Ga. filed May 6, 2005) (class action complaint); *Photos Etc. Corp. v. Visa U.S.A. Inc.*, No. 305-CV-1007 (RNC) (D. Conn. filed June 22, 2005) (class action complaint); *NuCity Publications, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-5991 (S.D.N.Y. filed June 28, 2005) (class action complaint); *Fairmont Orthopedics & Sports Medicine, PA. v. Visa U.S.A. Inc.*, No. 05-CV-6259 (S.D.N.Y. filed July 8, 2005) (class action complaint); *Parkway Corp. v. Visa U.S.A. Inc.*, No. 05-CV-6349 (S.D.N.Y. filed July 12, 2005) (class action complaint); *Tabu Salon & Spa, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-1111 (D.Conn. filed July 13, 2005) (class action complaint); *The Kroger Co. v. Visa U.S.A. Inc.*, No. 05CV-6409 (S.D.N.Y. filed July 14, 2005); *Rookies, Inc. v. Visa U.S.A. Inc.*, No. C-05-2933 (N.D. Cal. filed July 19, 2005) (class action complaint); *Broken Ground, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-6543 (S.D.N.Y. filed July 19, 2005) (class action complaint); *Baltimore Avenue Foods, LLC. v. Visa U.S.A. Inc.*, No. 05-CV-6532 (S.D.N.Y. filed July 19, 2005) (class action complaint); *East Goshen Pharmacy, Inc. d/b/a Optioncare of Chester County v. Visa U.S.A. Inc.*, No. 05-CV-1177 (D.Conn. filed July 22, 2005) (class action complaint); *Randall Jasperson d/b/a Jasperson Sod Service v. Visa U.S.A. Inc.*, No. C-05-2996 (N.D. Cal. filed July 22, 2005) (class action complaint); *Lakeshore Interiors v. Visa U.S.A.*, No. 05-CV-6683 (S.D.N.Y. filed July 26, 2005) (class action complaint); *Bonte Wafflerie LLC. v. Visa U.S.A.*, No. 05-CV-6708 (S.D.N.Y. filed July 26, 2005) (class action complaint); *Abdallah Bishara d/b/a Uncle Abe's Phillip 66 v. Visa U.S.A. Inc.*, No. 05-CV-4147 (E.D. Pa. filed Aug. 3, 2005) (class action complaint); *Lombardo Bros., Inc. v. Visa U.S.A. Inc.*, No. 05-CV-4146 (E.D. Pa. filed Aug. 3, 2005) (class action complaint); *518 Restaurant Corp. v. American Express Travel Related Servs. Co.*, No. 05-CV-4230 (E.D. Pa. filed Aug. 9, 2005) (class action complaint); *Jennifer Lee Photography v. Visa U.S.A. Inc.*, No. CV-05-3800 (E.D.N.Y. filed Aug. 10, 2005) (class action complaint); *Discount Optics, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-7175 (S.D.N.Y. filed Aug. 12, 2005) (class action complaint); *Hy-Vee, Inc. v. Visa U.S.A. Inc.*, No. CV-05-3925 (E.D.N.Y. filed Aug. 16, 2005); *Resnick Amsterdam & Leshner P.C. v. Visa U.S.A. Inc.*, No. CV-05-3924 (E.D.N.Y. filed Aug. 16, 2005) (class action

(Cont'd)

assert Sherman Act Section 1 causes of action that challenge Visa/MasterCard interchange prices.[3] Certain FMI members are serving as named plaintiffs in some of these cases;

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complaint); *Leeber Cohen MD v. Visa U.S.A. Inc.*, No. 05-CV-7317 (S.D.N.Y. filed Aug. 18, 2005) (class action complaint); *LDC, Inc. v. Visa U.S.A., Inc.*, No. 05-CV-7316 (S.D.N.Y. filed Aug. 18, 2005) (class action complaint); *G.E.S. Bakery, Inc. d/b/a Strauss Bakery v. Visa U.S.A. Inc.*, No. 05-CV-7414 (S.D.N.Y. filed Aug. 22, 2005) (class action complaint); *Connecticut Food Ass'n v. Visa U.S.A. Inc.*, No. 05-CIV-7456 (S.D.N.Y. filed Aug. 23, 2005) (class action complaint); *Hyman v. Visa Int'l Service Ass'n*, No. 05-CV-487-S (W.D.K.Y. filed Aug. 25, 2005) (class action complaint); *Meijer, Inc. v. Visa U.S.A. Inc.*, No. CV-05-4131 (E.D.N.Y. filed Aug. 29, 2005); *The Kroger Co. v. MasterCard Incorporated*, No. 05-CV-6913-DAB (S.D.N.Y. filed Aug. 31, 2005); *Fringe, Inc. v. Visa U.S.A. Inc.*, No. CV-05-4194 (E.D.N.Y. filed Sept. 2, 2005) (class action complaint); *Jax Dux & Bux, LLC v. Visa U.S.A. Inc.*, No. 05-CV-8058 (S.D.N.Y. filed Sept. 16, 2005) (class action complaint); *Michael Cetta, Inc. d/b/a Sparks Steak House v. Visa U.S.A. Inc.*, No. 05-CV-8060 (S.D.N.Y. filed Sept. 16, 2005) (class action complaint); *47 West 55th Rest. Inc. d/b/a Giovanni Ristorante v. Visa U.S.A. Inc.*, No. 05-CV-8057 (S.D.N.Y. filed Sept. 16, 2006) (class action complaint); *National Ass'n of Convenience Stores v. Visa U.S.A. Inc.*, No. CV-05-4521 (E.D.N.Y. filed Sept. 22, 2005) (class action complaint); *Jetro Holdings, Inc. v. Visa U.S.A. Inc.*, No. CV-05-4520 (E.D.N.Y. filed Sept. 23, 2005) (class action complaint); *Supervalu Inc. v. Visa U.S.A. Inc.*, No. CV-05-4650 (E.D.N.Y. filed Sept. 30, 2005); *Publix Super Markets, Inc. v. Visa U.S.A. Inc.*, No. CV-05-4677 (E.D.N.Y. filed Oct. 4, 2005); *Seaway Gas & Petroleum, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-4728 (E.D.N.Y. filed Oct. 6, 2005) (class action complaint); and *Raley's v. Visa U.S.A. Inc.*, No. 05-CV-4799 (E.D.N.Y. filed Oct. 12, 2005).

3. A class of all merchants accepting Visa and MasterCard credit card transactions for payment has previously been certified. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir 2001), *and cert. denied*, 536 U.S. 917 (2002).

numerous FMI and RILA members also are members of the putative classes.[4]

RILA and FMI submit this brief to advocate that Section 1 of the Sherman Act is, and must remain, applicable to the pricing activities of joint ventures whether or not those activities are engaged in after the initiation of the venture. Any other result would be inconsistent with Congressional intent, precedent and sound antitrust policy.

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4. While these cases are pending, it should be noted that foreign regulators have taken steps against the fixing of interchange by the Visa and MasterCard joint ventures outside the United States. *See, e.g.*, Office of Fair Trading, *MasterCard Interchange Fees Preliminary Conclusions*, OFT634 (Feb. 11, 2003), *at* www.oft.gov.uk/ NR/rdonlyres/9F26CE17-08E2-4680-8F4F-56A24980F8B9/0/oft634.pdf (setting forth the OFT's preliminary finding that MasterCard's interchange fees violated UK competition laws); Office of Fair Trading, *OFT Issues Statement of Objections on Visa Agreement*, Press Release 195/05 (Oct. 19, 2005), *at* http://www.oft.gov.uk/News/ Press+releases/2005/195-05.htm ("The OFT is of the view that the collective agreement between Visa and its member backs on the interchange fee charged between card issuing banks and merchant acquirers, on Visa card transactions taking place in the UK, restricts competition. . . ."); Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia IV, Final Reforms and Regulation Impact Statement*, August 2002, at 31, *at* http://www.rba.gov.au/PaymentsSystem/Reforms/CCSchemes/FinalReforms/index.html ("The Reserve Bank does not accept that interchange fees are collectively set in Australia under strong competitive conditions."). Other foreign antitrust authorities are also evaluating Visa/MasterCard interchange setting. *See, e.g.*, Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, June 17, 2005 at 2, *at* http://www.kc.frb.org/FRFS/PSR/PDF/WeinerWrightFinal061705.pdf (citing current scrutiny over interchange fees in the European Union, the Netherlands, Mexico and Spain).

SUMMARY OF ARGUMENT

1. Since the advent of the antitrust laws, Section 1 of the Sherman Act, 15 U.S.C. § 1, has protected consumers against the exploitation of joint ventures to subvert competition. In applying Section 1 to joint venture conduct, neither this Court nor Congress granted joint ventures special status or any kind of immunity from antitrust treatment. Where joint ventures impose restraints on price or output, that are not ancillary to or reasonably necessary for their functioning, they have been declared illegal. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Where restraints on price are in fact necessary to the joint venture's legitimate purposes, such as when they are ancillary to the creation of a product that the participants could not have created on their own, they have been found lawful. *See Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979). These principles are well-settled, and scores of procompetitive joint ventures have thrived against their backdrop.

In *Dagher*, the Ninth Circuit was faced with an efficiency-enhancing joint venture and respondents' claim that the agreement to align Texaco and Shell's pricing in the relevant market was a naked restraint of trade. It correctly asked whether the restraint was reasonably necessary to the venture's legitimate purposes. The question on this appeal, therefore, is not whether the Ninth Circuit erred in applying the ancillary restraints doctrine but rather whether it erred in the outcome of its ancillary restraints analysis. As such, nothing in the Ninth Circuit's decision suggests that any change in the antitrust laws' treatment of joint ventures is warranted.

2. Petitioners and Visa, by contrast, suggest that this case shows why *Copperweld* should be extended to joint ventures. Texaco, for example, contends that Section 1 should not have been applied because, once formed, the joint venture "eliminated all competition between [the participants] in the relevant market." Texaco Br. at 8.[5] Shell, for its part, asserts that because "the partners are merging all of their relevant business activities and therefore do not compete with the venture," Section 1 should not apply. Shell Br. at 9. Certain *amici* parrot this rationale: "once formed, the joint venture participants no longer are in competition with respect to matters within the scope of the venture," and the single entity doctrine should immunize the venture from Section 1. Visa Br. at 3.

While petitioners and their supporters wrap their argument in *Copperweld*, that decision does not support their attempt to rewrite the antitrust treatment of joint ventures. *Copperweld's* teaching shows why Section 1's application to this case should be beyond question. After this venture was formed, Texaco and Shell did not have the "complete unity of interest" which was central to *Copperweld's* finding that parents and their wholly owned subsidiaries cannot conspire. Texaco and Shell chose to form a joint venture (and not merge), because they continued to compete in other markets and wanted to preserve the flexibility to resume competition in the relevant market.

The petitioners contend that they had the requisite unity of interest because the venture ended all competition between

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5. References to "Texaco Br." are to Texaco's brief on the merits, to "Shell Br." are to Shell's brief on the merits, and to "Dagher Br." are to respondents' brief on the merits. References to "Visa Br." are to *amici* Visa, Coca-Cola and Microsoft's brief in support of petitioners, and to "Gov't Br." are to *amicus* United States' brief in support of petitioners. References to "Pet. App." are to the appendix filed with Texaco's petition for a writ of *certiorari*.

them in the relevant market. Even if that were true — and the record supports the conclusion that the oil companies, at most, suspended competition in the relevant market — that fact would not end the inquiry. As the United States acknowledged in its brief, an agreement regarding the pricing of a joint venture's products can affect competition between the participants outside the joint venture. Gov't Br. at 15 n.9. In fact, there is evidence of that occurring here; aligning the pricing of Texaco and Shell's products inside the joint venture may have facilitated the alignment of their aviation fuel prices outside the joint venture. Dagher Br. at 32-33. If Section 1 does not reach such pricing decisions, an arrangement that facilitates price-fixing in related markets would escape scrutiny. Nothing in *Copperweld* or this Court's numerous precedents regarding joint ventures' conduct would support such an extreme result.

3. Congress has never evinced an intent to relieve joint ventures from Section 1 scrutiny. Indeed, the enactment of the Standard Setting Development Organization Act of 2004, which recently reaffirmed that procompetitive standard setting joint ventures are subject to Section 1 rule of reason treatment, demonstrates Congress' reluctance to confer antitrust immunity on joint ventures.

4. Using this case to create a broad rule that immunizes restraints on conduct "within the joint venture" from Section 1 scrutiny post-formation would create a potentially dangerous and unprecedented safe harbor for joint venture conduct. Such *per se* immunity from Section 1 is precisely the type of formalistic line-drawing that petitioners and certain *amici* claim to abhor. More importantly, such a rule would offend the core antitrust precept that *per se* rules should be applied only to restraints that have highly predictable effects. Given that joint ventures come in many shapes and sizes, each with very different claimed efficiencies

and potential anticompetitive effects, there is no justification for a broad joint venture safe harbor from any potential Section 1 liability. Like all agreements that do not have predictable effects, joint ventures should be evaluated on a case-by-case basis, with an "enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

5. This Court granted *certiorari* to address the following question presented: "whether it is *per se* illegal concerted action under Section 1 of the Sherman Act for an economically integrated joint venture to set the selling price of its own products." *See Texaco Inc. v. Dagher*, No. 04-805, Vide 04-814, Questions Presented, *at* http://www.supremecourtus.gov/qp/04-00805qp.pdf. The question here is not whether *Copperweld* should be extended to joint ventures. Nor is it whether joint ventures should be given special immunity from Section 1 post-formation. Although the answers to those questions should be an unequivocal no, those issues are not raised on these facts, and therefore they should not be decided on this appeal. This conclusion is reinforced by the fact that the petitioners did not even raise their *Copperweld* argument in the court of appeals. Dagher Br. at 15, 22. For these reasons, this case is well-suited to the axiom, recently articulated by the Chief Justice, that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. United States Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004).

ARGUMENT

I. SECTION 1 PROPERLY APPLIES TO JOINT VENTURES

This Court has consistently applied Section 1 to joint venture conduct. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Broadcast Music*, 441 U.S. 1; *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 134 (1969) (joint venture that "end[ed] any business or commercial competition between the" participating newspapers subject to Section 1); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken*, 341 U.S. 593; *Associated Press v. United States*, 326 U.S. 1, 15 (1945) (holding that "[t]he Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete").

Professor Hovenkamp described the rationale for subjecting joint ventures to Section 1 treatment as follows:

> [J]oint ventures are analyzed under the "restraint of trade" standard rather than the monopoly standard. The restraint-of-trade standard condemns agreements that threaten marketwide output reductions, whether or not anyone is excluded. While antitrust tribunals should be loath to turn single firms into price-regulated utilities, they can and do review and disapprove agreements in restraint of trade. Thus, in the presence of market power firms acting in concert are *not* permitted to reduce aggregate

> output to a level lower than the competitive one, to raise prices higher than the competitive level, or to restrain innovation by agreeing to produce less than the competitive amount. As a result, we differ from those who would treat separate profit-maximizing entities as a single firm when the firms are organized into a joint venture. To be sure, such ventures yield joint provision of some inputs as well as output, but that does not set aside the fact that any threatened output reduction is the product of agreement rather than unilateral conduct.

See XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2101 (2005).

For these reasons, this Court has expressly declined to give joint ventures special status under the antitrust laws. This was articulated by the Court over fifty years ago in *Timken*, 341 U.S. at 598:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.

See also NCAA, 468 U.S. at 113 ("joint ventures have no immunity from the antitrust laws."); *In the Matter of Brunswick Corp.*, 94 FTC 1174, 1266 (1979) ("A price-fixing scheme or other cartel[-]like behavior cannot be insulated from review simply by fixing the 'joint venture' label to a device used to engage in behavior inherently pernicious to competition"), *modified*, 96 FTC 151 (1980), *aff'd sub nom., Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *and cert. denied*, 456 U.S. 915 (1982).

Accordingly, restraints on price or output that are not reasonably necessary to a joint venture's legitimate efficiency-enhancing purposes will be condemned. Such restraints pass antitrust muster, however, when they are reasonably necessary to the claimed efficiencies, such as when they underpin the creation of products that the venturers could not produce on their own. *See Broadcast Music*, 441 U.S. at 20-23. The ancillary restraints doctrine is thus critical to this framework, as it gives courts the ability to distinguish joint ventures (or joint venture restraints) that merely facilitate the exercise of market power from those that advance consumer welfare. Naked restraints make sense only because they enable the exercise of market power. By contrast, "a truly ancillary restraint is profitable irrespective of market control." XIII Herbert Hovenkamp, *Antitrust Law*, ¶ 2100b (2005). Applying these principles, if a joint venture restraint plausibly threatens to reduce marketwide output and increase prices, a court must examine whether the defendants can show ancillarity, "that is, that the restraint is profitable without regard to any market power or control held by the firms." *Id.* at ¶ 2100g. If defendants can make that showing, a full-blown rule of reason analysis must be applied. If they cannot, *per se* or quick look condemnation is appropriate.[6]

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6. This approach was recently described as follows:

> Once a court finds the joint venture proper, it can easily determine the appropriateness of any related competitive restraints among the parties to the venture. A court should simply consider whether such restraints are necessary to promote the venture's procompetitive purposes. If a joint venture itself is procompetitive, the courts should uphold any restrictions on competition necessary to achieve its legitimate purposes. . . . The defendant should have the burden of proving that a competitive restraint is required to further a venture's efficiency objectives. If a defendant fails to meet this

(Cont'd)

Faced with a summary judgment motion where the court was required to give respondents' evidence of anticompetitive effects all permissible inferences, the Ninth Circuit properly asked whether defendants could show that the restraint in question was reasonably necessary to achieve the venture's legitimate purpose. Nothing in this case warrants the slightest amendment to the well-settled antitrust framework for joint ventures, let alone the extreme changes advocated by petitioners and certain *amici*.

II. *COPPERWELD* SHOULD NOT BE EXTENDED TO JOINT VENTURE CONDUCT

Petitioners and certain *amici* seek to reverse the longstanding jurisprudence applying Section 1 to prohibit unreasonable restraints of trade enacted by joint ventures. Shell argues that "because the formation of [a fully integrated] joint venture will itself eliminate all relevant competition between the partners, a decision about the operation of the venture, once formed, cannot further restrict competition and is therefore not a proper subject of Section 1 inquiry." Shell Br. at. 14. Texaco contends that because Equilon purportedly "was a complete merger of the relevant businesses of the companies involved," it should be immune from Section 1 post-formation. Texaco Br. at 13. Visa and its co-*amici*, Coca-Cola and Microsoft, go even further: they argue that Section 1 is inapplicable to joint venture conduct post-formation because the antitrust laws permit owners of

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(Cont'd)

> burden, a court should preclude the restraint without any further inquiry.

Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1188-89 (2001). We see no reason to limit the ancillary restraints doctrine in the manner advocated by the petitioners and various *amici*.

"the venture to agree to eliminate competition that otherwise would exist between [them] in order to make their cooperation efficient." Visa Br. at 13.

These arguments depend on a misreading of *Copperweld* and a distorted characterization of the facts of this case. If anything, applying *Copperweld* to this case shows why Section 1 presumptively should apply to joint venture conduct post-formation.

Copperweld held that the coordinated conduct of a parent corporation and its wholly owned subsidiary could not comprise a conspiracy cognizable under Section 1. 467 U.S. at 771. The Court reasoned that because a "parent and its wholly owned subsidiary have a complete unity of interest," when they "'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests." *Id.* As a result, the Court found that the rationale for Section 1 scrutiny — the prevention of concerted action that "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands" (*id.* at 769) — simply does not apply to intra-corporate conduct. Decisions following *Copperweld* merely extended this reasoning to other corporate forms in which decentralization of a single corporation could manifest itself, such as the joint conduct of two subsidiaries wholly owned by one corporation.[7]

Nothing in *Copperweld* or its progeny supports its extension to joint venture conduct. In fact, *Copperweld* was specifically limited "to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in

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7. *See, e.g., Eichorn v. AT&T Corp.*, 258 F.3d 131, 138 (3d Cir.), *cert. denied*, 534 U.S. 1014 (2001); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987); *Hood v. Tenneco Tex. Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984).

violation of § 1 of the Sherman Act." 467 U.S. at 767. There is no sound antitrust policy rationale for extending *Copperweld*'s reasoning to joint venture conduct. In determining whether *Copperweld* immunizes coordinated conduct from Section 1 scrutiny, the critical inquiry is whether the alleged conspirators have pursued interests "which tend to show that any two of the defendants are, or have been, actual or potential competitors."[8] As Professor Areeda noted, "the most significant competitive threats arise when joint venture participants are actual or potential competitors," because such competitors "generally remain as important and independent market actors, often in competition with one another with respect to non-venture business." VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶¶ 1478a, 1478b2 (2d ed. 2003). Accordingly, lower courts have consistently applied Section 1 to collaborations between actual and/or potential competitors.[9]

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8. *City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 276 (8th Cir. 1988). *See also Jack Russell Terrier Network of Northern Cal. v. American Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005) ("The crucial question is whether the entities alleged to have conspired maintain an 'economic unity,' and whether the entities were either actual or potential competitors.").

9. *See Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (application of *Copperweld* to football league denied because NFL member clubs pursued diverse interests by competing in "several ways off the field"); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148-49 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003) (summary judgment for defendants reversed because defendants' joint venture not shielded from Section 1 liability under single-entity rule when defendants were both potential and actual competitors); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 215 (D.C. Cir. 1986) (Section 1 applied to decision of van line because all but two of the directors were actual or potential competitors, "and that is also sufficient to take this case out of the *Copperweld* rule."); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir. 2002) (Section 1 applied to league conduct "where, as here, the stockholders are themselves potential competitors with [the joint venture] and with each other.").

Here, Shell and Texaco did not fully integrate their operations. They continued to compete in other markets and remained potential competitors in the relevant market. They continued to compete in geographic markets outside the United States, in the upstream exploration and production of crude oil, and in the sale of marine and jet fuel in the United States. *See* Pet. App. at 5a, 56a. To preserve their ability to compete in other markets and potentially resume competition in the relevant market, Texaco and Shell retained ownership and control over their trademarks, licensed the right to use them to the joint venture, and entered into a "Brand Management Protocol" that required it to refrain from preferring one brand over the other. *Id.* at 5a, 58a. The only possible rationale for that arrangement was the parties' desire to protect their respective brands, given their continuing competition in other markets and the very real possibility that they might resume competition in the relevant market in the foreseeable future. Finally, the agreement permitted the dissolution of the joint venture at any time upon mutual consent, and notably, it was dissolved after only three years.

Because petitioners continued to compete in related markets (and remained potential competitors in the relevant market), the fact that the restraint related to the pricing of the venture's products should not immunize it from Section 1 scrutiny.[10] As this case shows, agreements regarding the pricing of a joint venture's products can affect competition between the participants outside the joint venture. Gov't Br. at 15 n.9. Respondents have proffered evidence that aligning the pricing

10. Notably, this case can be contrasted with the facts in *Broadcast Music*, 441 U.S. at 20-23, where this Court declined to apply the *per se* rule to a pricing restraint that underpinned the creation of a new product, the blanket license, which the individual composers could not produce on their own. Here, the joint venture did not produce any new products, and the petitioners failed to make a showing that the pricing restraint was reasonably necessary to achieve the cost savings that the joint venture was designed to foster.

of Texaco and Shell's products inside the joint venture facilitated the coordination of their aviation fuel prices outside the joint venture. Dagher Br. at 32-33. If Section 1 does not reach a restraint on pricing merely because it concerned the venture's products, an arrangement that facilitates price-fixing in related markets would escape scrutiny.

In sum, given that Texaco and Shell did not fully integrate their operations, the petitioners lacked the "complete unity of interest" demanded by *Copperweld*.[11] As actual and potential competitors, petitioners were clearly in a position to use Equilon to "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld*, 467 U.S. at 769. Section 1's application to this venture should be beyond question.

III. CONGRESSIONAL INTENT DEMONSTRATES THAT JOINT VENTURES SHOULD BE SCRUTINIZED UNDER SECTION 1

Congress has never enacted legislation absolving joint ventures from Section 1 scrutiny. Indeed, Congress declined to do that even in passing legislation with respect to joint ventures that are presumed to be efficiency-enhancing. In those instances, Congress has instead mandated that the

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11. Petitioners' reliance on *dicta* from this Court's decision in *Maricopa County* is misplaced. Specifically, *Maricopa County* observed that "joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit" should be treated as a single entity. 457 U.S. at 356. Because Texaco and Shell merely suspended competition in the relevant market and continued to compete in other markets, *dicta* regarding a complete integration where the partners "would otherwise be competitors" is plainly inapposite to this case.

conduct of such procompetitive joint ventures be adjudged under the rule of reason.

Just last year, Congress passed the Standards Development Organization Advancement Act of 2004 ("SDOAA"), Pub. L. No. 108-237, 118 Stat. 661, which amended the National Cooperative Research Act of 1984 ("NCRA"), *amended as* National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* *See* H.R. Conf. Rep. No. 98-1044, *reprinted in* 1984 U.S.C.C.A.N. 3131, 3132 (1984) (NCRA legislative shows Congress' refusal to immunize "classic cartel-like behavior by participants in a joint R&D venture" from Section 1 scrutiny). As a result, research and development joint ventures and standard development organizations, which make appropriate filings with the antitrust agencies, shall be scrutinized under the rule of reason. 15 U.S.C. § 4302. Congress could have immunized these organizations from all Section 1 scrutiny post-formation, but chose not to. Accordingly, Congressional intent demonstrates that the result urged by petitioners and supporting *amici* — immunity from Section 1 post-formation — is disfavored.

IV. EXTENDING THE SINGLE ENTITY DOCTRINE TO JOINT VENTURES WOULD CREATE AN UNWARRANTED SAFE HARBOR FOR MOST JOINT VENTURE RESTRAINTS

If *Copperweld* is contorted to apply to this case, then the antitrust laws would give joint ventures a virtually-complete safe harbor from Section 1 scrutiny post-formation. Visa and its co-*amici*, for example, contend that joint ventures "in which the participants agree to eliminate all competition between themselves and between themselves and the venture" should be treated as a single entity after formation. Visa Br. at 3. Even if that overbroad safe harbor made sense from an

antitrust policy perspective — which it does not — its factual premises bear no relationship to this case. Given that petitioners did not eliminate all competition between themselves, there is no need to reach this argument on this appeal.

In any event, this proposed safe harbor cannot be reconciled with precedent and sound antitrust policy.[12] Because most joint ventures are not scrutinized by antitrust regulators at formation, such a broad extension of the single-entity doctrine would invite competitors to collude free from Section 1 scrutiny even when their conduct produces nothing more than reduced output and higher prices for consumers.[13]

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12. Lower courts have condemned joint venture activity under Section 1 even when the conduct at issue was engaged in years after the venture was formed. *See e.g., United States v. Visa U.S.A. Inc.*, 344 F.3d 229 (2d Cir. 2003), *cert denied*, 125 S. Ct. 45 (2004) (condemning payment card association rules that precluded members from issuing cards offered by competitors). And others have noted that Section 1 is applicable even when the joint venture restraint was only directed at the activities of the joint venture participants. *See e.g., Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005) (holding that policy precluding partners from advertising discounts violated Section 1 because "[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors. . . ."); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48-49 (1st Cir. 2001) (noting that agreements to allocate territories among joint venture participants were "subject to antitrust attack under" Section 1).

13. Under 16 C.F.R. Sect. 801.40, a contributor to a joint venture is required to file notification under the HSR Act only if it satisfies the commerce and size-of-transaction tests under Section 7A of the Clayton Act. The HSR also could permit the consummation of potentially anticompetitive joint ventures with little or no scrutiny. As an example, A, an electronics manufacturer with $110 million in

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Moreover, as this case shows, even when joint ventures are scrutinized by regulators, the nature of the claimed integration, or the extent to which it impacts actual or potential competition between the participants, requires continuing Section 1 scrutiny after formation.[14] Here, *ex ante*, the joint venture may have superficially resembled a partial merger. *Ex post*, however, it looks like a temporary three-year suspension of competition, which may have facilitated price-fixing in markets outside the joint venture.

According to Visa and its co-*amici*, their proposed standard would not create "an unduly broad safe harbor for joint ventures" because Section 1 still would apply post-formation "to restraints on conduct outside the scope of the integration where the participants remain actual or potential

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sales, B, an office supply wholesaler with $90 million in assets, and C, an office supply manufacturer with $195 million in sales, form a joint venture with assets of $95 million to develop new marketing techniques for office supplies. A and B both acquire voting securities in the joint venture, while C receives nonvoting convertible securities. In this formation, only A would have to file notification (if it acquired voting securities valued in excess of $50 million) even though any competitive harm from the transaction would reside in the combination of B and C. B would be exempt because it does not satisfy applicable jurisdictional thresholds, and C's acquisition of nonvoting convertible securities would be exempt.

14. Notably, in their recent guidelines on competitor collaborations, the federal antitrust agencies avoided endorsing safe harbors, except in limited circumstances. *See* Federal Trade Commission & Department of Justice Antitrust Division, *Antitrust Guidelines for Collaborations Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13 (2000) ("*Guidelines*"). According to the agencies, Section 1 should reach joint venture activity except when the participants' market shares fail to reach specified thresholds or when at least four viable entities, including the joint venture, compete in an "innovation market." *Id.* at Section 4.

competitors, or where a restraint impacts competition between the venture and its participants *qua* owners." Visa Br. at 5. But this proposed limitation to Visa's safe harbor likely would not reach a situation in which the setting of the price of the joint venture's products indirectly facilitated price-fixing in related markets. In such situations, defendants will undoubtedly contend, as petitioners said here, that the restraint merely affected the price of the venture's products. And a broad safe harbor rule likely would permit their cartel activity to escape scrutiny. For these reasons, extending *Copperweld* to create a broad safe harbor for joint venture conduct post-formation would eliminate the protective shield Section 1 provides against anticompetitive joint venture conduct.

A broad safe harbor also cannot be squared with the antitrust principle that *per se* rules should be limited to restraints with predictable effects. It is hard to imagine an area of antitrust law less suited to an expansive formalistic *per se* rule than joint ventures. Such arrangements come in different forms, with varying purposes, efficiencies and potential anticompetitive effects. This is readily apparent from a comparison of Visa to the venture created by Texaco and Shell. Visa is a "consortium[] of competitor[] [banks] . . . which compete with one another in the issuance of payment cards and the acquiring of merchants' transactions." *United States v. Visa U.S.A. Inc.*, 344 F.3d 229, 242 (2d Cir. 2003), *cert denied*, 125 S. Ct. 45 (2004).[15] Visa itself admits that it "differs in many respects from the joint venture at

15. The Second Circuit further held that this consortium of competitors "set[s] the policies of Visa U.S.A.," and when those policies restrain competition between Visa's owner/members, they are the "exemplars of the type of anticompetitive behavior prohibited by the Sherman Act." *Id.* Visa has twice been found to have unlawfully exercised its substantial market power. *Id.* at 239-43; *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238, 2003 WL 1712568 (E.D.N.Y. April 1, 2003).

issue here." Visa Br. at 1. Sound antitrust policy demands that the antitrust treatment of such plainly disparate corporate forms be evaluated on a case-by-case basis, with an "enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *California Dental Ass'n*, 526 U.S. at 781. *See also Broadcast Music*, 441 U.S. at 8 (holding that, in antitrust law, "easy labels do not always supply ready answers.").

The Visa joint venture also highlights another danger in creating a safe harbor for joint venture conduct post-formation. Joint venture restraints that may have been necessary to the arrangement at formation can sometimes be transformed over time into naked restraints of trade. The defenders of fixed interchange sometimes argue that interchange fees were necessary to equilibrate the functions of the Visa (or MasterCard) payment networks at inception.[16] Even if that were true (and we would contest that it is), Visa (and MasterCard) interchange fees have mutated over time into nothing more than blatant exercises of market power. In other words, even though these fees are no longer necessary to the functioning of these networks, they continue to increase at enormous cost to merchants and consumers.

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16. The concept, which was accepted by the Eleventh Circuit in *National Bancard Corp. ("NaBanco") v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986), is that payment networks need both issuing banks (that issue card to cardholders) and acquiring banks (that sign up merchants) to function. If one side of the market bears a disproportionate share of the costs, it will need some reimbursement mechanism to have sufficient incentives to participate. The *NaBanco* court accepted the counterfactual argument that issuing banks, because of the costs they bear, needed such reimbursement in the form of interchange fees. *NaBanco*, 779 F.2d at 602-03, 605. Even if that argument made sense in the mid-1980s, it almost certainly had no validity by 1990.

At inception, the interchange fees fixed by Visa and MasterCard only applied to their credit card transactions. Since that time, Visa and MasterCard have extended their interchange price-fixing to signature debit card and commercial card transactions, and this tax on American merchants and consumers has increased exponentially. In 1971, when Visa introduced uniform interchange fees, U.S. merchants paid approximately $195 million in interchange.[17] In 1994, total Visa and MasterCard interchange fees paid by these merchants approximated $5.1 billion, and by 2004, total interchange fees paid approximated $26.5 billion.[18]

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17. *NaBanco*, 779 F.2d at 595; David S. Evans and Richard Schmalensee, *Paying With Plastic*, at 154 (2d ed. 2005); Visa U.S.A. Statistics & Reports, Payment Statistics – Volume, *at* http://www.usa.visa.com/about_visa/newsroom/statistics/volume.html?it=l2|/about_visa/newsroom/statistics/index%2Ehtml|Payment%20Statistics%20-%20Volume.

18. *See The Nilson Report*, Issues 591 (Mar. 1995), 833 (May 1995). Since 1990, Visa and MasterCard have intensified their exploitation of their power to cartelize their owner/member banks to fix interchange prices. In that time frame, Visa/MasterCard credit card interchange fees for the vast majority of non-supermarkets have increased 8-10 times (8 for Visa; 10 for MasterCard), totaling at least a 50-64 percent increase (50% for MasterCard; 64% for Visa). Also, since 1993, Visa/MasterCard credit card interchange fee rates for the vast majority of supermarkets have increased 6 times, totaling at least a 37-56 percent increase (37% for Visa; 56% for MasterCard). *See, e.g.*, *The Nilson Report*, Issues 758 (Feb. 2002), 765 (June 2002), and 793 (Aug. 2003); Credit Card Management, *Visa Tinkers with Credit Interchange* (Aug. 2003). During this time frame, the costs of issuing credit cards — the reimbursement of which is the purported justification for interchange — have declined substantially. *See NaBanco*, 779 F.2d at 605 (collective setting of credit card interchange lawful because court found (erroneously) that without guaranteed reimbursement of issuer costs, credit card issuers would not have incentives to participate in the Visa system).

V. THIS DECISION SHOULD BE LIMITED TO THE QUESTION PRESENTED

We address the implications of Visa's argument not to litigate the merchants' case against Visa's interchange price-fixing at this time, but rather to emphasize the pitfalls of deciding issues that need not be addressed on this appeal. Visa betrays its agenda — an expanded single entity doctrine that could immunize interchange from antitrust scrutiny — in a footnote that contends that Section 1 should not reach the functions of a network that produces "inherently interdependent" products because network conduct "by definition, do[es] not eliminate competition between the venturers that would exist but for the creation of the venture." Visa Br. at 15 n.9 (emphasis omitted).[19] Visa does not explain how a court could distinguish a pure "network function" from restraints that affect (and perhaps subvert) competition outside the venture without engaging in some form of Section 1 analysis. Absent Section 1 scrutiny, courts would be unable to make those critical distinctions. Whatever the case, because Visa's argument is far afield from the question presented on this appeal, it need not (and should not) be considered.[20]

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19. In making this argument, Visa neglects to mention *NaBanco* — the case it invariably cites to defend the collective setting of interchange — because that case applied Section 1 to interchange. While we disagree with *NaBanco's* ultimate ruling, the *NaBanco* court was correct in one respect: interchange should be scrutinized under Section 1.

20. Rule 14.1(a) of the Supreme Court Rules provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Although "[t]he statement of any question presented is deemed to comprise every subsidiary question," *id*, questions that are merely "related" or "complementary" to the question presented are not "fairly included therein." *Yee v. Escondido*, 503 U.S. 519, 537 (1992) (emphasis omitted); *Izumi Seimitsu Kogyo*

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CONCLUSION

For the foregoing reasons, this Court should decline to adopt a rule that automatically confers single-entity treatment to joint ventures or creates broad safe harbors for their conduct post-formation.

Dated: November 10, 2005

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Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 31-32 and n.5 (1993) (*per curiam*) ("[T]he fact that Izumi discussed this issue in the text of its petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.") (emphasis in original).

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Nos. 04-805 and 04-814

In the Supreme Court of the United States

TEXACO, INC., PETITIONER
v.
FOUAD N. DAGHER, ET AL.

SHELL OIL COMPANY, PETITIONER
v.
FOUAD N. DAGHER, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF VERIZON COMMUNICATIONS INC. AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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MOTION OF VERIZON COMMUNICATIONS INC. TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Pursuant to Rule 37.3 of the Rules of this Court, Verizon Communications Inc. respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief, but respondents have declined to consent.

This is an easy antitrust case – see U.S. Br. 19 (filed May 26, 2005) (suggesting summary reversal) – and yet the way this Court writes its opinion will have ramifications far beyond litigation over the Equilon joint venture directly at issue.

As a company that often engages in cooperative activity with other businesses to disseminate new products and services that *benefit* consumers, Verizon has a great interest in encouraging this Court to understand the many ways in which such cooperation – and agreements that accompany such cooperation – can be socially and economically beneficial, and should not be condemned under a *per se* rubric that requires an antitrust court to ignore the practices' market effects and justifications. The forms of cooperation that this Court should recognize as pro-consumer include, but are not limited to, formal joint ventures like the one at issue in this case. And the forms of often desirable practices that do not deserve *per se* condemnation, when they are ancillary to legitimate productive cooperation, include but are not limited to what the Ninth Circuit pejoratively labeled the "price fixing" at issue in this case.

Verizon is one of the largest providers of communications services in the United States and in the world. Like other firms in the telecommunications industry, Verizon operates in a business environment that requires large investments to enhance the technological capabilities of its telecommunications network and to develop new services, while at the same time reducing costs and prices. Joint ventures and other cooperative arrangements help Verizon to achieve those goals. Verizon and other telecommunications companies rely on many forms of cooperative arrangements to bring new services to the market and to reduce the cost and improve the quality of existing services. In this respect, Verizon's interest in appropriate antitrust rules for restraints ancillary to legitimate productive

cooperation is similar in kind to the interest of countless other businesses in all sectors of the economy. Verizon's interest differs in degree, however, because productive cooperation is especially common and useful in the telecommunications industry.

For example, high-risk investments that require large amounts of capital are often undertaken through joint ventures or other cooperative arrangements. Cooperation between potential competitors played a major role in the deployment of transoceanic fiber optic cables to carry telephone and internet traffic between the United States and Europe, Asia, South America, and other parts of the world. See, *e.g.*, David O. Williams, *An Oversimplified Overview of Undersea Cable Systems* 10 (2000), http://davidw.home.cern.ch/davidw/public/SubCables.html.

Cooperative arrangements are also commonly used for research and development projects, where they allow the partners to share costs and risks, and also bring together the partners' complementary skills and knowledge. Consumers of telecommunications services often have communications needs that extend beyond the boundaries of any single carrier's network. Joint ventures and other cooperative arrangements have been a valuable mechanism for serving such customers. For example, MCI partnered with British Telecom to provide complex services to multinational corporations with facilities throughout the world. *Request of MCI Communications Corp. & British Telecommunications PLC*, 9 FCCR 3960 (1994). Sprint entered into a similar arrangement with France Telecom and Deutsche Telekom. *Sprint Corp.*, 11 FCCR 1850 (1996). AT&T partnered with telecommunications carriers from other European and Asian countries. *Id.* ¶ 86. In theory, a multinational corporation could contract separately with MCI for services in the United States and with British Telecom for services in the United Kingdom. Such an arrangement, though, would require the customer to solve the complex problem of ensuring integration and compatibility between its telecommunications systems in the United States and in the United Kingdom. The joint ventures provided a mechanism through which the telecommunications carriers themselves could address that complex problem for the customer's benefit. *Id.* ¶¶ 84-87.

The importance of coordination and standard setting motivated the creation of another joint venture, Bellcore, in connec-

tion with the breakup of AT&T pursuant to an antitrust decree. That joint venture, financed and controlled by the seven regional Bell companies, was created to "perform the coordination for national defense and other emergency purposes that is vital to the nation's security" and to "set the standards which will permit telecommunications to continue to operate in an engineering sense as one national network." *United States* v. *Western Elec. Co.*, 569 F. Supp. 1057, 1118 (D.D.C. 1983). The decree court explained, "It seems beyond debate that uniform standards are necessary to ensure high quality in the telephone system, indeed its very survival as a nationwide network. Nor are such standards incompatible with competition." *Id.* at 1116 (footnote omitted).

The commission of error in the decision below is clear enough from this Court's prior decisions, but Verizon urges this Court to do more than simply reiterate the principles that were stated clearly in those decisions. By laying down a simple, *general* principle to distinguish "naked" restraints subject to the *per se* rule from "ancillary" restraints subject to the rule of reason, the Court can do much to remove a cloud of antitrust fear from *productive* cooperative activity that benefits American businesses and consumers alike.

For the foregoing reasons, Verizon's brief can present this Court with both a practical perspective and a legal argument that may not be fully covered by other briefs in this case. Verizon's motion to file the accompanying brief as *amicus curiae* in support of petitioners should be granted.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT . 1

ARGUMENT 3

I. Antitrust Rules Should Protect Output-Expanding Cooperation Even Among Firms That Might Otherwise Compete 3

II. Under *BMI*, *NCAA*, and *Northwest Wholesale Stationers*, Restraints Associated With Legitimate Cooperative Arrangements Are Not Subject To *Per Se* Condemnation 10

III. Experience Has Confirmed That The Cost Of Applying *Per Se* Rules To Restraints Ancillary To Output-Expanding Cooperative Arrangements Would Exceed The Benefits 15

IV. Restraints That Plausibly Could Contribute To The Success Of A Legitimate, Output-Expanding Cooperative Arrangement Should Be Evaluated Under A Properly Structured Rule Of Reason 20

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases:

Applications of SBC Communications, Inc. & BellSouth Corp., 15 FCCR 25,459 (2000) 25

Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) 11, 17

Bd. of Trade of Chicago v. *United States*, 246 U.S. 231 (1918) 10, 18

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ..... *passim*

Business Electronics Corp. v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988) 7, 14

California Dental Ass'n v. *FTC*, 526 U.S. 756 (1999) 11, 18, 28

Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) 11, 13, 14

FTC v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) 11

Nat'l Soc'y of Prof'l Eng'rs v. *United States*, 435 U.S. 679 (1978) 18

NCAA v. *Board of Regents*, 468 U.S. 85 (1984) 12, 13, 15, 18, 19, 22

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TABLE OF AUTHORITIES—Continued

Page(s)

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Page(s)

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BRIEF OF VERIZON COMMUNICATIONS INC. AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have powerful arguments in this case that Section 1 of the Sherman Act has no applicability at all because the challenged activity is simply a *single firm's* – Equilon's – setting of its own prices. Even if the Court determines or assumes that the challenged activity should be treated as an agreement between Texaco and Shell, and that those firms are competitors rather than businesses that have exited the relevant market, however, it is both easy and important to reject application of the *per se* rule.

The boundary line between practices condemned *per se* and those subject to the rule of reason has enormous practical consequences for antitrust litigation. See 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1511a, at 418-419 (2d ed. 2003); see also 2 *id.* ¶ 303b2, at 29-31 (2d ed. 2000). More specifically, if Section 1 applies at all, this case raises the question whether all practices that *literally* may be described using the labels of hardcore antitrust offenses – such as "price fixing" or "market allocation" – must be summarily condemned under the *per se* rule. The answer is no: such practices, when ancillary to productive, output-expanding activity, should be evaluated under a properly structured rule of reason, which permits consideration of the myriad ways such practices may be beneficial to competition.

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[1] Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

That is true even if the ancillary restraint is the product of an agreement between actual or potential competitors, and regardless of whether the parties' cooperative efforts are undertaken through a distinct legal entity (*e.g.*, a corporation or partnership) that is owned and managed by the cooperating firms, or separately by each of the businesses involved, pursuant to contractual arrangements. The true test of ancillarity – which was explained particularly well by Judge Easterbrook in *Polk Bros., Inc.* v. *Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985), and by Judge Bork in *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) – does not turn on such facts, but rather on "whether an agreement promoted enterprise and productivity at the time it was adopted. If it arguably did, then the court must apply the Rule of Reason to make a more discriminating assessment." *Polk Bros.*, 776 F.2d at 189. Agreements *legitimately* curtailing competition between the parties to cooperative arrangements arise in many settings, because businesses cooperating with one another must find ways to ensure that each will devote its wholehearted efforts to their mutual endeavor. As Professor Hovenkamp, Judge Bork, and Judge Easterbrook have all cogently explained, antitrust rules should protect such output-expanding cooperation.

Application of the *per se* rule to restraints accompanying such cooperation is dangerous, and conflicts with this Court's precedents. Time and again this Court has rejected efforts to pigeonhole ancillary restraints into the categories that experience has shown to be almost always anticompetitive. To say that a practice is literally "price fixing" or "market allocation," when it is ancillary to an output-expanding form of cooperation, is to substitute labels for antitrust experience and substance.

Extensive experience, in fact, has shown how benign ancillary restraints can be, and how little need there is for a *per se* rule to condemn *any* restraints ancillary to output-expanding cooperation. Economists and the antitrust enforcement agencies have reached a strong consensus that *per se* treatment is inappropriate. And the rule of reason can be applied in a

structured way to evaluate ancillary restraints, condemning those are truly anticompetitive but not creating a morass of uncertainty that will result in costly and unpredictable litigation and deter beneficial conduct because the outcome of antitrust litigation cannot be confidently forecasted. The *per se* rule is not needed to protect against false negatives, but it is sure to yield false positives in cases like this one.

Petitioners and *amici* have correctly identified numerous features of Equilon and the "price-fixing" agreement in this case that make it a particularly poor candidate for *per se* treatment, but the Court should not write an opinion as if only those particular characteristics can take a case outside the *per se* rule. Rather, if Section 1 applies at all, the issue of *per se* or rule-of-reason treatment should turn on a simpler and more fundamental question: Could the restraint plausibly contribute to the successful operation of an output-expanding cooperative arrangement? If the answer to that question is yes, the restraint cannot be condemned as *per se* illegal. It is especially misguided to apply *per se* rules if an expert government agency has carefully reviewed and blessed an ancillary restraint – a point the Ninth Circuit was quite wrong to ignore, in light of the FTC's review of the formation of Equilon. If an antitrust defendant asserts plausibly that an agreement could contribute to the successful operation of an output-expanding cooperative arrangement, that defense should be considered on its merits, not summarily rejected on the basis of formalistic distinctions.

ARGUMENT

I. Antitrust Rules Should Protect Output-Expanding Cooperation Even Among Firms That Might Otherwise Compete

"Cooperation is the basis of productivity. * * * Joint ventures, mergers, systems of distribution – all these and more require extensive cooperation * * *." *Polk Bros.*, 776 F.2d at 188. It is thus immediately apparent that the kinds of cooperation that *potentially* benefit consumers include, but are by no means limited to, traditional joint ventures such as Equilon, a

business entity separate from its parents. Beneficial cooperative arrangements range from simple contracts through formal joint ventures through full merger, with legitimate economic factors determining the choice among those forms of cooperation. See Howard Chang, David Evans & Richard Schmalensee, *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 239 ("Beginning with Coase's classic work on the nature of the firm, economists and legal scholars have recognized that the scope of a firm is determined, in part, by the relative advantages of conducting business through informal contracts between factors of production within the firm and employing formal contracts to link separate firms.") (citing Ronald H. Coase, *The Nature of the Firm*, in RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 33 (1990)).

Cooperation between *competitors* can be particularly beneficial in expanding output. Through such cooperation, businesses can make investments that would be too costly or too risky for a single firm to undertake; achieve economies of scale; combine complementary knowledge and skills (*e.g.*, in research and development projects); and establish uniform standards that make their products more useful and valuable to consumers. A company may seek to partner with a competitor to undertake virtually any business activity, including research and development, manufacturing, distribution, and marketing. The partners might form a joint venture with virtually complete autonomy from its parents, keep nearly complete control over the cooperative arrangement, or establish any form of entity with any intermediate degree of autonomy that the parents choose to confer; they can enter into arrangements for a narrow purpose and for a short duration, or for broad and open-ended purposes and for a permanent or indefinite duration. It is largely because of this flexibility that joint ventures and other cooperative arrangements hold out such promise for productive business activity.

A company that is considering whether to participate in a cooperative arrangement will, of course, consider the costs and

benefits of the alternatives. The principal alternatives are usually (1) acting unilaterally, rather than through a cooperative arrangement, and (2) a merger or acquisition that would unify the potential partners in a single firm. In many cases, both alternatives will be inadequate to achieve a company's business objectives and, more important, may be less beneficial to competition than a cooperative arrangement would be. A unilateral effort may not be feasible at all or may entail significantly greater costs or achieve less desirable results; the unattractiveness of that alternative is usually the reason that a partner is sought in the first place. A merger, likewise, may not be feasible for many reasons, and in any event will permanently and entirely eliminate competition between the potential partners. Nevertheless, companies may be forced to choose one of these suboptimal options if they are unable to achieve a satisfactory solution to a serious problem that often confronts cooperative arrangements: that the partners may have divergent interests that interfere with effective cooperation or that prevent the partners from devoting their wholehearted efforts to their mutual endeavor. See Chang et al., *supra,* 1998 COLUM. BUS. L. REV. at 243-249.

The most effective way to ensure that the partners' interests are aligned will often be to limit the degree to which they compete against each other and against any jointly owned business they may create, and to structure the arrangement so that each partner is appropriately rewarded for participation and investment in the cooperative effort. See 13 HERBERT HOVENKAMP, ANTITRUST LAW ¶2131, at 166-175 (2d ed. 2005) (discussing restraints to address free-rider problems and to create incentives for investment in a joint venture). Such arrangements have the purpose and effect of limiting the partners' competition *with each other* – not surprisingly, since cooperation between the partners is the essence of every business contract – and, because of that characteristic, they have sometimes raised antitrust concerns. In the vast majority of these arrangements, however, restrictions on the partners' competition with each other are an important component of

arrangements that allow the partners to achieve efficiencies that enhance competition against other market participants.

Accordingly, leading commentators have recognized that restraints may be ancillary – and thus subject to the rule of reason rather than the *per se* rule – to both joint ventures and other forms of cooperation between actual or potential competitors. Compare 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1908b (2d ed. 2005) (discussing restraints ancillary to "presumptively efficient joint venture or other transaction") with *id.* ¶ 1908c (discussing restraints ancillary to "lawful transfers of property rights, licenses, hiring agreements, dissolutions, and settlements"). "The integration of economic activities, which is indispensable to productive efficiency, always involves the implicit elimination of actual or potential competition. We allow it – indeed, should encourage it – because the integration creates wealth for the community. We should equally encourage those explicit and ancillary agreed-upon eliminations of rivalry that make the basic integration more efficient." ROBERT H. BORK, THE ANTITRUST PARADOX 28 (1978).

This Court too has recognized that restraints may be ancillary – and thus not treated as "naked" – to any transaction or relationship:

> The classic "ancillary" restraint is an agreement by the seller of a business not to compete within the market. See *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); Restatement (Second) of Contracts § 188(2)(a) (1981). That is not ancillary to any other contractual obligation, but, like the restraint here, merely enhances the value of the contract, or permits the "enjoyment of [its] fruits." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 282 (CA6 1898), aff'd, 175 U. S. 211 (1899); cf. Restatement (Second) of Contracts §§ 187, 188 (1981) (restraint may be ancillary to a "transaction or *relationship*") (emphasis added); R. Bork, The Antitrust Paradox 29 (1978) * * * (vertical arrangements are ancillary to the "transaction of supplying and purchasing").

Business Electronics Corp. v. *Sharp Electronics Corp.*, 485 U.S. 717, 729 n.3 (1988).

The Federal Trade Commission has accurately observed that "[n]o analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals." *Polygram Holding, Inc.*, Docket No. 9298 (FTC), http://www.ftc.gov/os/2003/07/polygramopinion.pdf, at 2 (2003), aff'd, 416 F.3d 29 (D.C. Cir. 2005). A key feature of that analytical exercise is to distinguish output-expanding from output-limiting cooperation.

> Determining whether a restraint is ancillary is simply a way of deciding whether it can be condemned as illegal "per se," or upon a relatively quick look; or whether a more complete analysis of the market and likely competitive effects is essential. In performing this analysis we must always keep two underlying questions in focus. *First*, the antitrust tribunal wishes to know whether the overall impact of the restraint is to reduce output, thus injuring consumers, or to expand output and benefit them. *Second*, the litigation process is costly and its ability to analyze complex, contested issues and produce accurate results is limited. As a result, simplifying assumptions are necessary.

11 HOVENKAMP, *supra*, ¶ 1908, at 251-252 (footnotes omitted).

The most successful judicial efforts to date to take stock of these basic points were, we submit, Judge Easterbrook's opinion for the court in *Polk Bros., Inc.* v. *Forest City Enterprises, Inc.*, *supra* and Judge Bork's opinion for the court in *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, *supra*. Like this Court in this case, the Seventh Circuit in *Polk Bros.* was reviewing the decision of a lower court that had subjected to the *per se* rule a restraint eliminating competition between two partners to a productive business arrangement. In *Polk Bros.* the restraint was a non-competition agreement (or "market allocation") whereas in this case it is an agreement regulating price (or "price fixing"), but in each case it was an agreement of a sort that – if

"naked" – could be condemned *per se*.[2] In *Polk Bros.* the cooperative arrangement to which the restraint was ancillary was a contractual arrangement to build a shopping mall whereas in this case it is a separate business entity formed as a joint venture. As Judge Easterbrook correctly understood, however, the particular restraint at issue, and the particular form of cooperative arrangement to which it is ancillary, are not the relevant questions:

> Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment. When cooperation contributes to productivity through integration of efforts, the Rule of Reason is the norm.
>
> A court must distinguish between "naked" restraints, those in which the restriction on competition is unaccompanied by new production or products, and "ancillary" restraints, those that are part of a larger endeavor whose success they promote. If two people meet one day and decide not to compete, the restraint is "naked"; it does nothing but suppress competition. If A hires B as a salesman and passes customer lists to B, then B's reciprocal covenant not to compete with A is "ancillary." * * *
>
> The evaluation of ancillary restraints under the Rule of Reason does not imply that ancillary agreements are not real

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[2] For purposes of this discussion we *assume* that the price setting at issue should be treated as an agreement between Shell and Texaco rather than as single-firm conduct, and that Shell and Texaco should be treated as competitors despite the total exit of both from the relevant market on the formation of Equilon. As noted earlier, we acknowledge, and in no way wish to contradict, petitioners' powerful arguments that it should be treated as a joint venture's pricing of its own products and not subject to Section 1 of the Sherman Act at all, or as an agreement by non-competitors. But we also make the fundamental point that the price setting cannot possibly be condemned *per se* even on the assumption that it should be treated as an agreement between competitors.

horizontal restraints. They are. * * * The difference comes at the time people enter beneficial arrangements. * * *

A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. If it arguably did, then the court must apply the Rule of Reason to make a more discriminating assessment. * * *

A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output. If the restraint, viewed at the time it was adopted, may promote the success of this more extensive cooperation, then the court must scrutinize things carefully under the Rule of Reason. * * *

* * * * *

The reason for distinguishing between "ancillary" and "naked" restraints is to determine whether the agreement is part of a cooperative venture with prospects for increasing output. If it is, it should not be condemned *per se*.

776 F.2d at 188-190 (citations omitted).

The D.C. Circuit emphasized the same points in *Rothery*:

All horizontal restraints are alike in that they eliminate some degree of rivalry between persons or firms who are actual or potential competitors. * * * The difficulty [with a rule treating such restraints as *per se* illegal] was that such a rule could not be enforced consistently because it would have meant the outlawing of very normal agreements (such as that of law partners not to practice law outside the firm) that obviously contributed to economic efficiency. The alternative formulation was that of Judge Taft in *Addyston Pipe & Steel*: a naked horizontal restraint, one that does not accompany a contract integration, can have no purpose other than restricting output and raising prices, and so is illegal *per se*; an ancillary horizontal restraint, one that is part of an integration of the economic activities of the parties and appears capable of enhancing the group's

> efficiency, is to be judged according to its purpose and effect.

792 F.2d at 229.

This reasoning is compelling, particularly when one recalls that classification of a restraint as "ancillary" has one, and only one, consequence: the classification permits the court to *consider a practice's market effects, including (if necessary) its justifications* – rather than cut off inquiry as the *per se* rule does – when deciding whether the restraint promotes competition and expands output, or unreasonably restricts competition and limits output. The rule of reason produces both judgments for plaintiffs and judgments for defendants, but it permits *informed* judgments.

The alternative is to misclassify restraints that are *not* of the sort that "considerable experience" shows to be almost always anticompetitive, *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 2 (1979), as if they were the same as the traditional *per se* categories such as "price fixing" and "market allocation." It is to substitute a jurisprudence of labels for one of substance. That is decidedly *not* what this Court's cases – or the logic of antitrust law – require, with respect to joint ventures or any other form of cooperative arrangement.

II. Under *BMI*, *NCAA*, and *Northwest Wholesale Stationers*, Restraints Associated With Legitimate Cooperative Arrangements Are Not Subject To *Per Se* Condemnation

Per se rules of illegality have been exceptional in the interpretation and application of the Sherman Act throughout its history. Early on this Court recognized that the Sherman Act could not be construed to prohibit every restraint of trade without prohibiting *every* commercial agreement, because "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Bd. of Trade of Chicago* v. *United States*, 246 U.S. 231, 238 (1918). Congress plainly did not intend to prohibit every agreement that restricts competition; "Congress intended to outlaw only

unreasonable restraints." *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997) (emphasis added). A "rule of reason," appropriately defined and structured, has thus been "the prevailing standard of analysis" of restraints challenged under the Sherman Act. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977); see *California Dental Ass'n* v. *FTC*, 526 U.S.756, 781 (1999).

However, some kinds of restraints, including "price fixing" among would-be rivals, are subject to a "conclusive presumption" of unreasonableness and are condemned as illegal *per se*. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 345 (1982). That *per se* rule, where it applies, severely limits the defenses that a defendant may proffer and that a court or jury may consider. It is irrelevant whether the agreed-upon prices are reasonable. See, *e.g.*, *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990). It is irrelevant whether the defendants had the ability to raise market prices above competitive levels (*i.e.*, whether they possessed "market power"). See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-226 n.59 (1940). The actual market effects of the agreement are irrelevant and need not be proved. *Id.* at 225.

Because it severely limits the ability of courts to consider whether a particular restraint may be beneficial, rather than harmful, the *per se* rule is a dangerous weapon in the hands of private plaintiffs, who naturally seek to protect their own commercial interests, whether or not the public interest is served. The dangers are especially severe when the rule is invoked to challenge efforts by competing firms to cooperate in order to achieve efficiencies. Three landmark decisions protect against that danger.

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (*BMI*), involved an antitrust challenge to "blanket licenses" offered by BMI and ASCAP, organizations that were formed to represent the interests of thousands of independent copyright owners. The blanket licenses permitted

licensees to pay a single fee to BMI or to ASCAP for the right to use any of the copyrighted music in their respective portfolios. *BMI* held that this arrangement was not a *per se* violation, but did not decide whether it would be illegal under a rule-of-reason analysis.

NCAA v. *Board of Regents*, 468 U.S. 85 (1984), examined restrictions on the number of NCAA football games that could be offered for television broadcasts. Although it recognized that "[r]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit," *id.* at 107-108, the Court held that the *per se* rule did not govern analysis of this restraint, because some degree of cooperation by the NCAA's members, rather than unrestrained competition, served to "widen consumer choice." *Id.* at 102. The restraint therefore was evaluated under the rule of reason, but was found to be illegal.

Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), involved a purchasing cooperative formed by independent office supply retailers to reduce their costs of procuring office supplies for resale. Pacific was expelled by the cooperative and then sued, alleging that the expulsion was a "group boycott" that was illegal *per se*. The Court held that the *per se* rule against boycotts did not apply, and remanded the case for evaluation under the rule of reason.

The common thread in all three cases was that the defendants' activities were integrated in ways that offered the potential to achieve significant efficiencies. In *BMI*, the blanket license obviated individual negotiations with thousands of copyright owners, resulting in a "substantial lowering of costs." 441 U.S. at 21. In *NCAA*, even though the NCAA acted to limit its members' activities in myriad ways, "the great majority of the NCAA's regulations enhance competition." 468 U.S. at 103. In *Northwest Wholesale Stationers*, the formation of the purchasing cooperative was "'designed to increase economic efficiency and render markets more, rather than less, competitive.'" 472 U.S. at 295 (quoting *BMI*, 441 U.S. at 20).

In each case, the context of the restraint – not the fact that some form of competition was literally restrained – was decisive, because restraints associated with efficiency-enhancing integration or output-expanding cooperation lack the basic characteristic required for application of a *per se* rule: They do not "always or almost always tend to restrict competition and decrease output." *BMI*, 441 U.S. at 20-21. "[D]eparture from the rule of reason standard must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing." *GTE Sylvania*, 433 U.S. at 58-59. An "overly simplistic and often overbroad" approach that asks whether "two or more potential competitors have literally 'fixed' a 'price,'" *BMI*, 441 U.S. at 9, cannot reliably determine whether restraints associated with a cooperative arrangement will have such effects because restraints on competition between partners often contribute to the cooperative arrangement's legitimate and procompetitive operations. To illustrate that point, the Court in *BMI* gave as an example precisely the situation alleged in this case: "When two partners set the price of their goods or services they are literally 'price fixing' but they are not *per se* in violation of the Sherman Act." *Ibid.* When restraints are adopted in the context of an output-expanding cooperative arrangement, "[a] fair evaluation of their competitive character requires consideration of the * * * justifications for the restraints" even if the restraint directly limits participants' freedom "to compete in terms of price and output." *NCAA*, 468 U.S. at 103.

That principle follows from the fundamental rationale for the *per se* rule, which is explicitly grounded on a cost/benefit analysis. *Per se* rules entail a cost of error, because a court cannot even consider potential justifications for the restraint or its effects in a particular market context. Balanced against that cost of error is a potential benefit, because the *per se* rule eliminates the cost of litigation concerning the justifications and effects of the restraint. As the Chief Judge of the D.C. Circuit (and former Assistant Attorney General for the Antitrust Division) explained recently:

> *Per se* analysis, which requires courts to generalize about the utility of a challenged practice, reduces the cost of decision-making but correspondingly raises the total cost of error by making it more likely some practices will be held unlawful in circumstances where they are harmless or even procompetitive * * * The converse – increased litigation cost but reduced cost of error – obtains under the rule of reason, which requires an exhaustive inquiry into all the myriad factors bearing on whether the conduct is on balance anticompetitive or procompetitive.

Polygram Holding, Inc. v. *FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005) (internal quotations and citations omitted).

This Court has emphasized time after time that the benefits outweigh the costs *only* if *per se* condemnation is reserved for restraints that are "manifestly anticompetitive." *GTE Sylvania*, 433 U.S. at 49-50. The only restraints that warrant the *per se* label are those that have "predictable and pernicious anticompetitive effect, and * * * limited potential for procompetitive benefit." *Khan*, 522 U.S. at 10 (citing *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958)). Restraints that plausibly enable a cooperative arrangement to operate more effectively – whether or not they are "essential" to the venture – do not satisfy that standard. See *Polk Bros.*, 776 F.2d at 189 (emphasis added) ("A restraint is ancillary when it *may* contribute to the success of a cooperative venture that promises greater productivity and output."). In this setting, "the conclusion that [a restraint] is virtually always likely to have an anticompetitive effect is not warranted." *Northwest Wholesale Stationers*, 472 U.S. at 296; accord *BMI*, 441 U.S. at 20-21 (restraint that "accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use" cannot be deemed a restraint that "always or almost always tend[s] to restrict competition and decrease output"); see also *Business Electronics*, 485 U.S. at 729 (rejecting the dissent's "naked restraint" analysis and instead treating the agreement as "ancillary" because "[a] quite plausible purpose of the restriction [is] to enable Hartwell to provide better services" under the sales agreement).

III. Experience Has Confirmed That The Cost Of Applying *Per Se* Rules To Restraints Ancillary To Output-Expanding Cooperative Arrangements Would Exceed The Benefits

The clarity with which this Court has laid down rules inconsistent with the Ninth Circuit's holding below led the Solicitor General, in response to this Court's invitation, to suggest summary reversal. U.S. Br. 19 (filed May 26, 2005). We agree wholeheartedly that the Ninth Circuit's decision must be reversed under existing precedents.[3] To the extent there is any question, however, of taking a fresh look at those precedents, we respectfully submit that experience counsels that the Court should confirm and reinforce the strong movement, in lower court decisions and agency actions, toward *more*, not less, hospitable treatment of restraints that accompany efficiency-enhancing cooperative arrangements.

Considerable experience with restraints ancillary to cooperative arrangements has demonstrated overwhelmingly that such restraints are not always, almost always, or even usually anticompetitive. The lesson to be drawn from more than two decades of experience applying the rule of reason under *BMI*, *NCAA*, and *Northwest Wholesale Stationers* is exactly the opposite. If there was any doubt two decades ago concerning the costs and benefits of applying the rule of reason to such restraints, those doubts have been erased by experience. Two developments, in particular, provide strong support for continuing to examine such restraints under the rule of reason.

1. First, in the years since *BMI*, *NCAA*, and *Northwest Wholesale Stationers* made clear that restraints ancillary to output-expanding cooperative arrangements should not be summarily condemned, lower courts have examined an extraordinary number and variety of such restraints under the

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[3] The U.S. Chamber of Commerce, the American Bankers Association, and other *amici* also believe that the Ninth Circuit erred in applying a *per se* analysis.

rule of reason. As *Polk Bros.* and *Rothery* illustrate, when courts have evaluated the *actual* competitive effects of these restraints, they frequently have found that the restraints are procompetitive, rather than harmful to consumers. See also Brief for Visa U.S.A. Inc., et al. Supporting Petitioners (to be filed Sept. 12, 2005).

The antitrust agencies, likewise, have concluded that ancillary restraints often serve a legitimate purpose by promoting effective cooperation in output-enhancing collaborations. The agencies have issued guidelines to make clear that such restraints are often beneficial and to describe the specific and limited circumstances in which they may pose a threat to competition. FTC & Department of Justice Antitrust Division, *Antitrust Guidelines for Collaborations Among Competitors* (2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf. The agencies have emphasized, consistent with the lower courts' experience, that competitors' cooperative arrangements "often are not only benign but procompetitive. Indeed, in the last two decades the federal antitrust agencies have brought relatively few civil cases against competitor collaborations." *Id.* at 1.[4]

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[4] The agencies' Collaboration Guidelines followed several years of empirical study including two months of public hearings at the Federal Trade Commission. A report following the hearings concluded that "[g]lobal and innovation-based competition is driving firms toward ever more complex collaborative agreements. Collaborations among rivals raise many new and complex competitive issues * * * Witnesses at the hearings agreed that antitrust treatment of collaborations among rivals is an important issue in need of clarification." 1 FEDERAL TRADE COMMISSION, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE, ch. 10, at 1 (May 1996). "Collaborations among rivals can generate significant efficiency gains. By bringing the abilities and resources of several companies together, collaborating firms may attain economies of scale and scope; increase capacity and market access; minimize risk; avoid duplication; transfer, commercialize, or distribute technology efficiently; combine complementary or co-specialized capabilities; or better appropriate the returns of innovation. Such benefits, or efficiencies, can speed the development of new products, lead to better products, reduce the costs of

Scholars and other commentators overwhelmingly support the view that such restraints often promote efficiency and competition. There is continuing debate about the subtleties of analyzing such restraints under the rule of reason; there is virtually no debate that the rule of reason, rather than *per se* analysis, should govern. See, *e.g.*, Chang et al., *supra*, 1998 COLUM. BUS. L. REV. at 301 (describing divergent proposals for rule-of-reason analysis but noting consensus that ancillary restraints should be treated under the rule of reason); Edward Correia, *Joint Ventures: Issues in Enforcement Policy*, 66 ANTITRUST L.J. 737, 753-755 & nn.70-71 (1998).

2. The cost/benefit calculation underlying *per se* rules should also take account of changes over the past two decades in litigation under the rule of reason. The principal benefit of the *per se* rule – avoiding the cost of protracted litigation under the rule of reason – is somewhat illusory because rule-of-reason litigation is less of a morass than it once was, and need not be a morass at all if properly structured.

In 1982, in *Maricopa*, this Court correctly observed that *per se* rules "avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken.'" 457 U.S. at 351 (quoting *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958)). At that time, the rule of reason was rightly derided as a mode of analysis in which "everything is relevant, nothing is dispositive." Frank H. Easterbrook, *The Limits Of Antitrust*, 63 TEX. L. REV. 1, 12 (1984).

That was true then, but is not widely true today and this Court should make clear authoritatively that it should not be true. "[T]he questions that the rule of reason considers can generally be answered with a far less elaborate and more

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product development, and enhance interoperability in a particular industry." *Id.* ch. 10 at 2 (footnotes omitted).

focused inquiry than Justice Brandeis [in *Chicago Board of Trade*] had in mind." 13 HOVENKAMP, *supra*, ¶ 2100g, at 17. In large measure because substantive antitrust doctrine has been refined and clarified, rule-of-reason cases need not be incredibly complicated and prolonged. Many can be resolved without "'elaborate industry analysis.'" *NCAA*, 468 U.S. at 109 (quoting *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978)). All that is required is "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *California Dental Ass'n*, 526 U.S. at 781. The "most condensed" rule of reason analysis may be conducted in "the twinkling of an eye." *Id.* at 780 (quoting PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1507, at 402 (1986)). Some restraints require a bit more – the kind of analysis that has been described as a "quick look" – and others require a "less quick look." *Id.* at 781. And some, but certainly not all, require "the fullest market analysis" or a "plenary market examination." *Id.* at 779.

Properly structured, rule-of-reason analysis need not and should not be a morass. Courts can adopt screens or presumptions – such as those suggested by Judge Easterbrook in 1984,[5] or those suggested in more recent scholarship that builds on

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[5] Easterbrook, *supra*, 63 TEX. L. REV. at 17-18. According to Judge Easterbrook, first the plaintiff should be required to show that the defendants have market power – a screen the plaintiffs in this case would fail. Second, the plaintiff should be required to show that the defendant has an incentive to behave in an anticompetitive way and that antitrust sanctions are necessary to correct the defendant's incentives. Third, the court should ascertain whether firms in the industry use different methods of production and distribution. Fourth, the court should ask whether the evidence is consistent with a reduction in output. Fifth, the court should use the identity of the plaintiff to draw inferences about the competitive effects of the challenged conduct, recognizing that rivals are most likely to challenge conduct harmful to them but beneficial to consumers. "Only when a potentially-efficient business practice passes all five filters should a court undertake the heroic efforts required by today's Rule of Reason." *Id.* at 18.

Judge Easterbrook's original insights[6] – to make application of the rule of reason both practical and predictable. Otherwise, antitrust litigation becomes a lottery in which lay juries are asked to decide economic questions that trained economists find surpassingly difficult. And, even worse, if rule-of-reason analysis is unstructured, businesses are deterred from beneficial cooperation because no competent counselor can assure them that a particular practice that has both clear pro-consumer benefits and arguable countervailing negative effects on competition will survive the courts' indeterminate inquiry.

Because it is clear today (even though it was not clear when *BMI* and *NCAA* were decided) that rule-of-reason litigation can and should be conducted efficiently, there is far less reason to tolerate the cost of error that inevitably flows from *per se* rules. Indeed, there is reason to suspect today that an antitrust plaintiff – like respondents, see U.S. Br. 16 & n.17 (filed May 26, 2005) – who is unwilling even to attempt to prove liability under a

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[6] See, *e.g.*, David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005). Professor Evans and Dr. Padilla note that Judge Easterbrook in 1984 "emphasized the importance of presumption in structuring antitrust inquiries" and "observed that the full rule of reason approach is often impractical." Commenting on what economists have learned since the Easterbrook article was published, they state that, with "the benefit of over twenty years of game-theoretic industrial organization models * * *, [we are] skeptical about the ability of economics to provide the necessary guidance for a full-blown rule of reason inquiry." *Id.* at 75 n.8. Accordingly, they suggest three presumptions about unilateral practices. *Id.* at 81. Because the present case is brought (rightly or wrongly) under Section 1 of the Sherman Act, which does not address unilateral practices, the details of these scholars' proposed presumptions are not especially relevant to the Court's decision. What *is* relevant, however, is their larger point that experience and scholarship have demonstrated the need to avoid both blindered condemnation (under the *per se* rule) of practices with procompetitive justification, and formless rule-of-reason inquiry that produces no predictable outcomes and therefore deters beneficial conduct because no one can be sure it will not be condemned.

rule-of-reason analysis is merely trying to exploit that risk of error.

IV. Restraints That Plausibly Could Contribute To The Success Of A Legitimate, Output-Expanding Cooperative Arrangement Should Be Evaluated Under A Properly Structured Rule Of Reason

1. Petitioners and *amici* have argued that the application of a *per se* rule is particularly inappropriate because of the specific characteristics of the pricing decision challenged in this case. They argue, for example, that the pricing decision here should be regarded as single-firm conduct that is not subject to Section 1 of the Sherman Act, *e.g.*, Texaco Pet. 10-12; that it is an absolute necessity to establish prices for a joint venture's products, *e.g.*, Shell Pet. 12; that the restraint concerned only the joint venture's activities, not parents' activities outside of the joint venture, *e.g.*, U.S. Br. 15-16 (filed May 26, 2005); and that, after formation of the joint venture, its parents were no longer competitors (because all of their assets and operations in the relevant market were transferred to the joint venture), *e.g.*, *id.* at 8-9, 11. We agree that the practice challenged in this case could not have unreasonably restricted competition in light of those characteristics.

The establishment of a Section 1 "restraint" between two separate actors is of course a threshold condition even to be considering possible *per se* condemnation. But that obvious requirement aside, the Court will needlessly discourage desirable cooperative arrangements if it suggests that any of these specific characteristics of *this* restraint are required to ensure rule-of-reason analysis. The issue of *per se* or rule-of-reason treatment should turn on a simpler and more fundamental question: Could the restraint plausibly contribute to the successful operation of an output-expanding cooperative arrangement? If the answer to that question is yes, the restraint cannot be condemned as *per se* illegal.

This principle will preserve *per se* analysis for "price-fixing" agreements (and other *per se* offenses) if a joint venture

or other cooperative arrangement is a sham that involves no meaningful integration of the parties' businesses or other output-expanding cooperation. It would also preserve *per se* analysis if the cooperative arrangement itself is legitimate, but if the "price fixing" is unrelated to the joint venture's legitimate activities. See U.S. Br. 13 n.12 (filed May 26, 2005). But it would ensure rule-of-reason analysis for any restraint that plausibly could contribute to the successful operation of an efficiency-enhancing integration. See 7 AREEDA & HOVENKAMP, *supra*, ¶ 1511c, at 420-421. See generally Easterbrook, *supra*, 63 TEX. L. REV. at 5 ("The inhospitality tradition of antitrust has proven very costly. The costs were inevitable. Wisdom lags far behind the market.").

Satisfaction of this standard does not establish that any restraint is lawful, merely that a proper inquiry into material market facts is needed. If a defendant can *plausibly* assert that the restraint serves to promote effective cooperation to expand output, further inquiry is appropriate, because it cannot be concluded with confidence that the restraint will be anticompetitive. See 11 HOVENKAMP, *supra*, ¶ 1908, at 252 ("To say that a restraint is 'naked' is to conclude that little plausible basis exists for thinking that the restraint has a significant potential for output expansion.").

The FTC's decision in *Polygram* – in methodology if not result – provides an instructive illustration of this standard. In that case, two recording companies established a joint venture to produce and market a new recording by the "Three Tenors." Separately, they agreed to limit discounting and other forms of competition in the sale of their several previously released, independently owned Three Tenor recordings. This second agreement was deemed by the FTC to be "inherently suspect." *Polygram Holdings, Inc.*, http://www.ftc.gov/os/2003/07/polygramopinion.pdf, at 36. It clearly restricted competition outside of the joint venture, including competition between the parents and competition between each of the parents and the joint venture. In that respect, the agreement arguably posed a greater threat to competition than did the agreement challenged

in this case, which involves only the joint venture's pricing (and not the parents' pricing for sales outside of the joint venture) and parties who, after formation of their joint venture, did not compete against one another *at all*.

The FTC, nonetheless, refused to invoke the *per se* rule in analyzing the restraint. Instead, the FTC examined the defendants' assertion of legitimate justifications for the restraint, *i.e.*,"plausible reasons" that the restraint "may not be expected to have adverse consequences in the context of the particular market in question" or would be likely "to have beneficial effects for consumers." *Polygram Holdings, Inc.*, http://www.ftc.gov/os/2003/07/polygramopinion.pdf, at 29. The FTC defined a "plausible" justification as one that "cannot be rejected without extensive factual inquiry." It did not require the defendant to produce "detailed evidence" supporting its justification, so long as the defendant could "articulate the specific link" to such benefits, sufficient to "merit a more searching inquiry." *Id.* at 31.

The FTC ultimately rejected the justifications that were asserted and found that the restraint unreasonably restricted competition. For present purposes, though, the critical fact is that the FTC recognized that, when a defendant puts forward a "plausible reason" that the restraint may be reasonable, that reason must be considered and addressed, and cannot be rejected out of hand through application of the *per se* rule. In so holding, the FTC followed the approach used by this Court in *BMI, NCAA*, and *Indiana Federation of Dentists*, and by courts of appeals in the *Polk* and *Rothery* cases, by evaluating the asserted justifications rather than applying a formalistic *per se* label and refusing to consider them at all.

Another example is described by the Department of Justice in its *Antitrust Guidelines For The Licensing Of Intellectual Property*, http://www.usdoj.gov/atr/public/guidelines/0558.htm. Those guidelines discuss the appropriate antitrust analysis of field-of-use and territorial restrictions that may be included in intellectual property licenses. If the licensor and licensee would

otherwise be competitors, such restrictions could be described literally as horizontal customer or territorial allocation agreements. But, as the guidelines explain, such restraints:

> may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free-riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example, by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself.

Id. § 2.3. Because of their potential value in promoting such efficiencies, such restraints should not be governed by *per se* rules even though they can accurately be characterized as horizontal market allocation. Instead of applying a formalistic label, "[t]o determine whether a particular restraint in a licensing arrangement is given *per se* or rule of reason treatment, the Agencies will assess whether the restraint in question can be expected to contribute to an efficiency-enhancing integration of economic activity." *Id.* § 3.4. "In the vast majority of cases, restraints in intellectual property licensing arrangements are evaluated under the rule of reason." *Ibid.*

2. Courts need not, and should not, rely solely on their own independent assessments of the likely competitive effects of ancillary restraints. Today, most joint ventures of any commercial consequence are carefully examined by one or more expert agencies, *and are approved by the agency*, before a court is asked to pass judgment. The Federal Trade Commission carefully examined the plans for Equilon's formation and operation (including the plan that prices for the joint venture's products would be established by the joint venture and/or its

parents) and reached a considered judgment that the price-setting arrangements challenged in this case would not harm competition, but the Ninth Circuit disregarded that conclusion.

Pre-formation antitrust review and approval of this kind is now the rule, rather than the exception, for joint ventures that might pose a substantial threat to competition. The formation of a commercially significant joint venture usually entails a substantial acquisition of stock or assets that triggers a notification requirement under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a. The Federal Trade Commission and the Department of Justice receive advance notice of such acquisitions, and both agencies have broad authority to investigate and challenge the formation and operation of joint ventures that may impair competition.[7]

The FTC and the Antitrust Division are not the only agencies that evaluate the competitive effects of joint ventures. In many industries, including the telecommunications industry, the competitive effects of a joint venture are also evaluated by a federal regulatory agency. The Federal Communications Commission reviews joint ventures within its jurisdiction under a "public interest" standard that requires consideration of the

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[7] The main point of this brief is that output-expanding, efficiency-enhancing cooperative arrangements take many forms, not limited to separately formed joint ventures like Equilon, and that the Court should make clear that *all* restraints ancillary to *any* such legitimate cooperative arrangement are to be judged – if subject to Section 1 at all – under the rule of reason. Nevertheless, some cooperative arrangements, depending on their form, may receive scrutiny from expert government regulators. When that scrutiny has resulted in a conclusion that a particular restraint is competitively benign, courts cannot treat it as the sort that experience shows to be always or almost always anticompetitive. The rule of reason should always be applicable once it has been determined that a restraint is ancillary to an output-expanding cooperative arrangement, but the folly of applying *per se* rules is especially pronounced when the arrangement is – like Equilon in this case, or the numerous telecommunications ventures reviewed by the FCC – one that has already been flyspecked by expert regulators and approved with the restraint in place.

venture's effects on competition under the principles of the antitrust laws. See, *e.g.*, *Applications of SBC Communications, Inc. & BellSouth Corp.*, 15 FCCR 25,459, 25,466-25,467 (¶ 18) (2000) (defining "public interest" standards that govern review of a joint venture in the wireless telecommunications industry). As this Court recently observed, "'[a]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.'" *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (quoting *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.)).

Whether the industry is regulated or unregulated, it is especially misguided for the judiciary to apply a *per se* rule to invalidate a practice that an expert agency, after rigorous scrutiny, has concluded is competitively benign. As this Court recognized in *BMI*, when an expert government agency has concluded that a joint venture restraint is competitively benign, its conclusion provides "a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain." 441 U.S. at 13. For that reason, if a government agency has concluded that a restraint is benign, a court should rarely, if ever, subject that restraint to summary condemnation under a *per se* rule.[8]

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[8] Aside from the facts of this case itself, another example proves this larger point. The Sprint/France Telecom/Deutsche Telekom and MCI/British Telecom joint-venture agreements approved by the FCC, see Motion, *supra*, included provisions to assign exclusive rights to market the joint ventures' services in defined geographic areas, *i.e.*, a literal "market allocation." The FCC's order approving the MCI joint venture discusses the territorial allocation and concludes, "[W]e cannot discern any significant direct anticompetitive effect flowing from the territorial allocation provision in any market in which the parties would potentially compete in the absence of the restraint." *Request of MCI Communications Corp. & British Telecommunications PLC*, 9 FCCR 3960, 3972 (¶ 54) (1994); see also *ibid.* (¶ 56). Under the Ninth Circuit's rationale

3. The Ninth Circuit incorrectly followed a very different approach in this case. After acknowledging that Equilon was a legitimate joint venture that achieved substantial efficiencies by integrating its parents' marketing businesses, the Ninth Circuit held that the *per se* rule could apply to the defendants' pricing agreement unless the defendants could show that the agreement "is reasonably necessary to further the legitimate aims of the joint venture" – and appeared to equate "reasonably necessary" with "essential." Shell Pet. App. 21a. That standard is inconsistent with any reasonable conception of the *per se* rule because a restraint may be *useful* in achieving a joint venture's legitimate and procompetitive purposes, even if it is not "necessary" or "essential."[9]

The distinction is critical. Very few ancillary restraints can be deemed "essential" (although establishing a price for the joint venture's product fits that description) because *some* alternative arrangement – albeit an alternative that is more costly or less effective – will usually be available to the parties. A standard that demands proof that a restraint is "reasonably necessary" differs only in degree. Business judgments, especially at

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in this case, however, the parties would have borne a heavy burden to escape from application of the *per se* rule to invalidate the "market allocation."

[9] "[I]t is possible, in principle, to demonstrate that a particular [joint venture] operational rule with anticompetitive costs has no offsetting efficiency benefits because the observed efficiencies could be realized by a 'less restrictive' operational rule with no anticompetitive consequences. However, we would urge caution in attempts to imagine 'less restrictive' alternatives to joint venture rules. It is too simple for economists and lawyers, acting as armchair business people, to make conjectures about solutions to joint venture problems that involve less anticompetitive potential. It is quite a different matter to demonstrate that such solutions are likely to work in practice; whereas the rules actually implemented by joint ventures have generally been proven by experience to be functional and stable. Therefore, the argument that there are alternative joint venture rules that are less restrictive must be viewed with a carefully skeptical eye." Chang et al., *supra*, 1998 COLUM. BUS. L. REV. at 286-87.

the *outset* of a cooperative effort, cannot be calibrated so finely, at least with any confidence. Potential participants in a cooperative relationship must consider the risk that a court applying such a standard, with the benefits of both hindsight and the creativity of a plaintiff's lawyer, will conclude that a particular restraint was not "necessary" to achieve their legitimate and procompetitive objectives. If the consequence of such a judgment is that a restraint will be condemned without further consideration of its actual purpose or effect, and treble damages will be imposed, businesses inevitably will be discouraged from entering into many arrangements that would be efficient and beneficial to consumers.

It is particularly bizarre that the Ninth Circuit found it blameworthy – and respondents' brief in opposition treats the case as if it turns on a "finding" – that petitioners may have agreed on the joint venture's pricing mechanism at or before the time the joint venture actually came into existence. Shell Pet. App. 19a-20a & n.11; Br. in Opp. 11-13. As Judge Easterbrook explained in *Polk Bros.*, 776 F.2d at 190,

> The suggestion that the ancillary restraints doctrine does not apply to new ventures also slights the functions of the rule. The partners of a newly-formed law firm agree on fees and allocate subjects of specialty and clients among them; this "price fixing" and "market division" do not become unlawful just because the firm is new. The benefits of cooperation may be greatest when launching a new venture.

As the United States has correctly recognized, U.S. Br. 8-13, 19 & n.20 (filed May 26, 2005), the restraint at issue in this case is not subject to *per se* condemnation, whether it was entered into *before, during, or after* formation of the joint venture.[10]

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[10] If anything, the alleged fact that the partners entered into the restraint before forming the joint venture tends to prove that it was needed to make the concededly procompetitive joint venture work, a sufficient but not necessary condition for application of the rule of reason. At the same time, if the restraint had been entered into after the joint venture was already in existence, it would not follow that it was *not* appropriately

Commercial agreements should be evaluated under the antitrust laws through an "enquiry meet for the case." *California Dental Ass'n*, 526 U.S. at 781. If an antitrust defendant asserts plausibly that an agreement could contribute to the successful operation of an output-expanding cooperative arrangement, that defense should be considered on its merits, not summarily rejected on the basis of formalistic distinctions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2005

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considered ancillary. See William Kolasky & Richard Elliott, *The Federal Trade Commission's Three Tenors Decision: "Qual Due Fiori a Un Solo Stello"*, ANTITRUST, Spring 2004, at 50, 52-53 (footnotes omitted) ("As Coase and Williamson taught, it is very difficult to draft complete contracts at the time a joint venture is formed. It is essential, therefore, that parties to joint ventures have freedom to alter terms of contact as they learn more about their joint product, market conditions, and each other. * * * Given the difficulty of drafting complete contracts, parties would be far less likely to form joint ventures if they did not have the freedom to later adjust the terms of their agreement to assure that each partner did not behave opportunistically. * * * Denying parties the flexibility to take steps like this after the venture is first formed would force parties to similar joint ventures in the future either to try to negotiate a more costly and comprehensive (and likely more restrictive) agreement from the outset or to forgo such ventures entirely.").

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Case Nos. 04-805 and 04-814

IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF VISA U.S.A. INC., THE COCA-COLA COMPANY AND MICROSOFT CORPORATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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MOTION OF *AMICI* FOR LEAVE TO FILE BRIEF

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, Visa U.S.A. Inc. ("Visa"), The Coca-Cola Company ("Coca-Cola") and Microsoft Corporation ("Microsoft") respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of petitioners. Petitioners have consented to the filing of this brief; respondents have refused their consent.

The judgment of the court of appeals is plainly wrong and should be reversed. But it also sends the signal that lower courts face uncertainty regarding the proper analysis of joint ventures. *Amici* submit that this case provides an opportunity for the Court to clarify the circumstances under which firms involved in joint ventures are at risk of antitrust liability by providing a clear articulation of the antitrust rules governing such ventures. Of those rules, the one in greatest need of clarification is when a joint venture should be treated as a single entity consistent with *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

As further explained in the accompanying brief, *amicus* Visa is one of the largest and most successful joint ventures in the world, and has been involved in some of the most important joint venture cases over the past two decades. *Amici* Coca-Cola and Microsoft participate in numerous joint ventures around the world. For *amici*—indeed, for the numerous businesses that have become increasingly dependent on cooperation as a means of facilitating competition—the development of clear antitrust rules applicable to joint ventures is crucial. *Amici* can provide this Court with important input into the formulation

of these rules, and their impact on American business, that goes beyond what can be addressed by the parties.

Accordingly, *amici* respectfully request leave to file the accompanying brief.

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Dated: September 12, 2005

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. IT IS IMPORTANT TO ESTABLISH A CLEAR FRAMEWORK FOR ANALYZING JOINT VENTURES UNDER U.S. ANTITRUST LAW	6
II. THE SINGLE ENTITY DOCTRINE PLACES A VENTURE'S OWN ACTIVITIES OUTSIDE THE AMBIT OF SECTION 1.	12
III. COMPETITIVE EFFECTS SHOULD BE ASSESSED AT THE TIME A JOINT VENTURE IS ESTABLISHED	21
IV. THE ANCILLARY RESTRAINTS DOCTRINE IS IMPORTANT IN MANY JOINT VENTURE CASES BUT IT HAS NO APPLICATION HERE.	26
CONCLUSION	30

TABLE OF AUTHORITIES

Cases *Page*

Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) 12, 13, 20

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) 8

Blackburn v. McSweeney, 53 F.3d 825 (7th Cir. 1995)..... 27

Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979)..... 7, 9, 10

Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988)..... 26

Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918)..... 8

Chicago Prof. Sports Ltd. P'ship v. NBA, 95 F.3d 593 (7th Cir. 1996)..... 13, 15, 17, 20

City of Mt. Pleasant, Iowa v. Assoc. Elec. Coop., 838 F.2d 268 (8th Cir. 1988)..... 14

Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000), *cert. denied*, 531 U.S. 223 (1975)..... 22

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)..... *passim*

Fraser v. Major League Soccer, 284 F.3d 47 (1st Cir. 2002)..... 14

Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133 (9th Cir. 2003)..... 14

	Page
General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984)	27
In the Matter of Chevron Corp., Docket No. C-4023 (January 7, 2002)	24
In the Matter of General Motors Corp., 103 FTC 374 (1984)	28
In the Matter of Polygram Holding, Inc., 2003 FTC LEXIS 120 (July 24, 2003), *aff'd*, 416 F.3d 29 (D.C. 2005)	8, 28
In the Matter of Shell Oil Company, 125 F.T.C. 769, Consent Order (April 21, 1998)	23
Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027 (9th Cir. 2005)	14
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	14
Nat'l Bancard Corp. v. Visa U.S.A. Inc., 779 F.2d 592 (11th Cir. 1986)	1
Nat'l Soc. of Prof. Engineers v. United States, 435 U.S. 679 (1978)	8
NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984)	3, 7, 9, 15
NFL v. North Am. Soccer League, 459 U.S. 1074 (1982)	17, 27
North American Soccer League v. NFL, 670 F.2d 1249 (2d Cir. 1982)	14

Page

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985)... 7

Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185 (7th Cir. 1985)..... 11, 27

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986).....11, 26, 27

SCFC ILC, Inc. v. Visa U.S.A. Inc., 36 F.3d 958 (10th Cir. 1994)..... 1

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) 8

State Oil Co. v. Khan, 522 U.S. 3 (1997)..... 9

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).....5, 6, 27

United States v. du Pont de Nemours & Co., 353 U.S. 586 (1957)..... 22

United States v. ITT Cont'l Baking Co., 420 U.S. 223 (1975)..... 22

United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964)..... 18, 21

United States v. Topco Assoc. Inc., 405 U.S. 596 (1972)..... 27

United States v. Visa U.S.A. Inc., 163 F.Supp.2d 322 (S.D.N.Y. 2001), *modified in part on other grounds*, 183 F.Supp.2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (October 4, 2004).....1, 11, 15, 27

Page

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 14

Statutes

15 U.S.C. 1 ..... *passim*

15 U.S.C. 2 6

15 U.S.C. 15b § 4b 22

15 U.S.C. 18 § 7 ..... 21, 22

15 U.S.C. 45 § 5 28

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V Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) ¶ 1205 25

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¶ 1462b 17
¶ 1478 21
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XI Herbert Hovenkamp, *Antitrust Law* (1998)
¶ 1907c 7

XI Herbert Hovenkamp, *Antitrust Law* (2005)
¶ 1906d 18
¶ 1908e 18, 19

	Page
XIII Herbert Hovenkamp, *Antitrust Law* (2005)	
¶2132c	19
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Thomas A. Piraino, Jr., *A Proposed Antitrust Approach To Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001)	6, 7
Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871 (1994)	7

BRIEF OF *AMICI* SUPPORTING PETITIONERS

INTEREST OF *AMICI*

Amicus Visa U.S.A. Inc. ("Visa") is one of the world's largest and most successful joint ventures, created to bring to American consumers the benefits of a general purpose payment card network. As a joint venture that has created a payment system that is "truly greater than the sum of its parts[,]" *Nat'l Bancard Corp. v. Visa U.S.A. Inc.*, 779 F.2d 592, 602 (11th Cir. 1986) (internal quotation omitted), Visa has a significant interest in this case. Although Visa differs in many respects from the joint venture at issue here, its continuing viability, and the enormous competitive benefits that it has created, are dependent upon the articulation and application of coherent, predictable and efficient antitrust principles for joint ventures. The lack of such principles can result in costly, burdensome and potentially destabilizing antitrust litigation. Visa has been at the center of some of the most significant antitrust cases relating to joint ventures over the past two decades. *See Nat'l Bancard Corp.*, 779 F.2d 592; *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994); and *United States v. Visa U.S.A. Inc.*, 163 F.Supp. 2d 322 (S.D.N.Y. 2001), *modified in part on other grounds*, 183 F.Supp. 2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 45 (October 4, 2004).[1]

[1] This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel. Petitioners have consented to the filing of this brief; respondents have refused their consent. Accordingly, the requisite motion for leave under Rule 37.3 of the Rules of United States Supreme Court is filed with this brief.

Amici the Coca-Cola Company and Microsoft Corporation are among America's best known and most successful companies, with operations spanning the globe. Each is involved in numerous joint ventures here and abroad, and each seeks to enter into others with confidence and clear knowledge of the applicable legal principles under U.S. antitrust law.

SUMMARY OF ARGUMENT

1. Joint ventures play an increasingly important role in the domestic and world economy, but those that offer the potential for the greatest economic benefits continue to be treated as second-class corporate citizens under U.S. antitrust law. As this case makes unmistakably clear, many courts remain highly skeptical of any agreements limiting competition among horizontal competitors, even where such agreements are integral to the formation or operation of a legitimate joint venture. That attitude inappropriately discourages the formation of such ventures. This case, therefore, provides an appropriate, and much needed, opportunity for this Court not simply to reverse the holding below (which is quite plainly mistaken) but to articulate a clear approach to the analysis of joint ventures under U.S. antitrust law—including the proper standards for addressing the legality of a venture upon formation and thereafter; when a venture should be regarded as a single entity; and when the ancillary restraint doctrine applies.

2. This Court noted in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), that joint ventures lie somewhere between single-firm activity and horizontal combinations. That brief *dicta*, however, did no more than pose a fundamental issue of characterization—when Sec-

tion 1 applies to a joint venture—that is every bit as important in commercial terms as the parent-subsidiary question decided in *Copperweld*. That issue needs to be decided here.

Section 1, 15 U.S.C. 1, unquestionably applies to the formation of a joint venture among competitors and to their agreement to eliminate certain types of competition between them. But once formed, the joint venture participants no longer are in competition with respect to matters within the scope of the venture *i.e., the permitted scope of the integration*. Therefore, within the scope of the venture's operations, they are legally incapable of forming a horizontal agreement subject to Section 1. *See NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984) (a horizontal agreement is "an agreement among competitors on the way in which they will compete *with one another*") (emphasis added). A joint venture in which the participants agree to eliminate all competition between themselves and between themselves and the venture, thus, should be treated as a single entity when it does those things it was established to do because, as *Copperweld* teaches, its participants are no longer "independent centers of decision making that competition assumes and demands." 467 U.S. at 769.

To hold otherwise, and subject every decision of a joint venture firm to potential antitrust scrutiny—even under the rule of reason—undermines the utility of joint ventures as a form of industrial organization. Consistent with the rationale of *Copperweld*, after formation a venture should not be treated as a day-by-day conspiracy of its creators, but instead, should be regarded as a single entity carrying out its approved operations without risk of Section 1 liability. Application of the single entity doctrine to alleviate

the perpetual risk of rule of reason litigation, thus, is a necessary precondition to the placement of joint ventures on equal footing with other forms of industrial organization.

3. In this case, the Federal Trade Commission ("FTC") and several state Attorneys General resolved the issue of Equilon's legality and the permissible scope of its owners' integration when they approved the establishment of the venture in the first place. As they recognized, the formation of Equilon (and a companion venture, Motiva) eliminated all competition between Shell and Texaco with respect to the refining and sale of gasoline in the United States. Pet. App. 4a.[2] Put simply, Shell and Texaco ceased to participate separately in U.S. downstream markets. *Id.* Accordingly, the regulators analyzed the formation of Equilon as if it were a complete merger of the companies' downstream operations.

Petitioners' decision to create Equilon purportedly is not challenged by the respondents. But once the matter of Equilon's existence and the scope of its operations was resolved, there was no Section 1 question left to be considered where the only matter in issue was the right of the venture to set the prices for the things it has been allowed to make and sell. It is no more appropriate to ask whether Equilon should be allowed to decide what to charge for Texaco and Shell gasoline than to ask whether Sears can put a price tag on its dishwashers, or a law firm can decide what to charge for its attorneys' services. By characterizing the venture's setting of a price for the sale of its own gasoline as *per se* illegal, the court of appeals, in reality, posed (and answered) an entirely different question:

[2] References are to the appendix filed with Shell's petition (04-814).

whether the joint venture should be permitted to engage in the production and marketing of gasoline in the first place. Such a question may be raised, but not by means of a *per se* price-fixing claim alleging a horizontal conspiracy by the venture's members. To the contrary, the decision to allow the Texaco-Shell venture (a) to be created and (b) to include the production and marketing of Shell and Texaco gasoline within its scope necessarily carried with it—free from Section 1 attack—the right to price the products it was allowed to produce and market.

The court of appeals committed fundamental error by permitting what is tantamount to an after-the-fact attack on formation under the guise of a *per se* price-fixing claim. Imposing a risk of liability for doing no more than what has been approved by the regulators is not simply legally misguided, but is inimical to sensible competition policy.

4. Correct application of the single entity doctrine in this case will not create an unduly broad antitrust safe harbor for joint ventures. Issues of legitimacy and scope remain entirely fair (indeed, necessary) subjects of review by regulators and courts under both Section 1 and Clayton Act Section 7, 15 U.S.C. 18.

Section 1 also applies, post-formation, to restraints on conduct outside the scope of the integration where the participants remain actual or potential competitors, or where a restraint impacts competition between the venture and its participants *qua* owners. Thus, a restraint on non-venture output is subject to analysis under the ancillary restraints doctrine. Similarly, an agreement by Shell and Texaco not to compete with Equilon in the downstream market in the United States is a restraint ancillary to the formation of Equilon. *See, e.g., United States v. Addyston Pipe & Steel*

Co., 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). In addition, as *Copperweld* observed, Section 2, 15 U.S.C. 2, of the Sherman Act applies to single firm conduct, and hence, is fully applicable to predatory behavior by joint ventures at any time. 467 U.S. at 777.

Nonetheless, a clear distinction needs to be drawn between a venture's own operations and activities falling outside the venture as to which the venture's owners remain competitors. The formation of Equilon eliminated all competition in the downstream gasoline business between Shell and Texaco. A decision by Equilon as to how to price the gas it sells is not ancillary to anything. It is the very activity for which the venture was created and, as such, presents no Section 1 issue under the ancillary restraint doctrine or otherwise.

ARGUMENT

I. IT IS IMPORTANT TO ESTABLISH A CLEAR FRAMEWORK FOR ANALYZING JOINT VENTURES UNDER U.S. ANTITRUST LAW.

Joint ventures are ubiquitous and operate in virtually every sector of the economy. It has been estimated that the number of joint ventures and strategic alliances are growing annually by 25 to 35 percent, with a current rate of formation of approximately 10,000 per year. *See* Peter Pekar, Jr. and Mark S. Margulis, *Equity Alliances Take Center Stage*, 14:2 Bus. Strategy Rev. 50, 55 (2003). They are a vital part of our economic system, *see* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach To Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1139, (2001) ("collaborations are becoming the dominant form of eco-

nomic integration in the world economy"), and it is, therefore, critically important to protect their utility as a form of industrial organization.

This Court has recognized the significant procompetitive benefits that joint ventures—particularly those among competitors—can generate. *See, e.g., NCAA*, 468 U.S. at 103 ("a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."); *see also Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (*"BMI"*); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). So, too, have commentators. *See, e.g.*, XI Herbert Hovenkamp, *Antitrust Law* ¶ 1907c, 221 (1998) (joint ventures can generate "cost reductions [that] tend to yield higher output and lower prices . . ."); *see also* Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 876 (1994) ("A joint venture may allow its partners to achieve economic efficiencies that they could not have accomplished on their own. In the long run, such efficiencies may outweigh any restriction of competition caused by a joint venture."); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 702 (1998) ("Joint ventures are an important and distinct category for antitrust analysis because of their potential to bring about an efficiency-enhancing integration of economic activity."). Regulators have also acknowledged that competitor collaborations can generate efficiency gains that "stem from combinations of different capabilities or resources," or that "facilitate the attainment of scale or scope economies beyond the reach of any single participant." Department of Justice ("DOJ") & FTC, *Antitrust Guide-*

lines for Collaborations Among Competitors (Apr. 2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (Apr. 12, 2000) ("*Guidelines*"), § 2.1.

Precisely because of their ubiquity and potential for producing significant consumer welfare benefits, it is critical for courts to develop and apply appropriate rules for dealing with joint ventures. As then-FTC Chairman Timothy Muris observed: "No analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals." *In the Matter of Polygram Holding, Inc.*, No. 9298, 2003 FTC LEXIS 120, at *12, *aff'd* 416 F.3d 29 (D.C. Cir. 2005) ("*Three Tenors*").

American antitrust law, uniquely, is a creature of judicial, as opposed to legislative, decision-making. Not only is the language of the Sherman and Clayton Acts exceedingly general in critical respects, those statutes—as this Court has observed, on several occasions—cannot mean what they say.[3] Yet, incorrect antitrust analysis, and the resulting uncertainty which it fosters, pose serious risks to effective competition. Particularly in the area of joint ventures, where the law has struggled to encourage efficient business organizations amidst its inherent distrust of horizontal arrangements among competitors, there is a compelling need for certain, predictable and efficient rules. *See*

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[3] *See Nat'l Soc. of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says."); *see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-32 (1983); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

generally Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 4-9, 12-13 (1984) (discussing risks of permitting business practices to be second-guessed under the antitrust law by courts and juries who are not well-equipped to balance the "pros" and "cons" of allegedly exclusionary practices).

Amici submit that there is little doubt that the court of appeals' decision in this case was mistaken both in result and in approach. In fact, the decision to apply the *per se* rule in this case was so plainly misdirected that it is tempting simply to reverse on the ground that the practice in question here cannot possibly come within the narrow category of practices deemed conclusively unlawful without even a consideration of other market facts. *See, e.g., NCAA*, 468 U.S. at 100 (*per se* rule may be applied only to an agreement that "facially appears to be one that would almost always tend to restrict competition and decrease output"); *see also State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (*per se* rule to be applied only where there are "predictable and pernicious anti-competitive effects" as well as "limited potential for pro-competitive benefits") (citation omitted). Small wonder, then, that the United States not only urged this Court to review that decision, but suggested that the Court consider summary reversal. *See* Brief of the United States as *Amicus Curiae* (in support of petitions for writ of certiorari) ("Br. of U.S.") at 19. Yet, however inviting that suggestion may have been, to do so would be to miss an important—and much needed—opportunity both to clarify the application of the antitrust laws to joint ventures and, even more important, to address the actual issue presented by this case, which is why does Section 1 apply here at all? *Amici* respectfully submit that the central

issue presented by this case is not the application of the rule of reason (as opposed to the *per se* rule) but whether a joint venture's decision to price its goods presents anything more than the act of a single entity, to be adjudicated as such. Put in doctrinal terms, is the pertinent authority *BMI*, 441 U.S. 1, or *Copperweld*, 467 U.S. 752? *Amici* suggest that it is the latter.[4]

Amici, thus, urge this Court not only to reverse, but to use this case as an opportunity to clarify the circumstances under which firms involved in joint ventures are at risk of antitrust liability. To assist the Court, *amici* suggest a framework for analyzing joint venture conduct that will encourage the formation of pro-competitive ventures while permitting adequate assessment of their potential adverse effects on competition.

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[4] In *BMI*, 441 U.S. 1, this Court held that an agreement among joint venturers nominally "fixing" the price of their respective outputs might, because of the obvious efficiencies associated with collective licensing of copyrighted music, not be subject to *per se* condemnation. 441 U.S. at 20-21. That decision was both unquestionably right and an important step forward in terms of analyzing joint venture conduct. However, it is equally important to resist the temptation to treat it as the outer limits of what a joint venture can claim as protection under the antitrust laws. In that case, the output in issue was that of the members, not of the venture, and it remained such following formation of the venture. The fact that there was an obvious efficiency justification in the reduction of transaction costs from a blanket license did not remotely suggest that there was no antitrust issue at all (*i.e.*, that the *BMI* venture should have been treated as a single entity). That was a classic rule of reason case. However, it is quite different from the situation where a joint venture is allowed to integrate production and marketing functions into the venture itself, thereby in effect merging the pre-existing operations of the venturers in the new entity and eliminating all competitive activity by the participating venture partners in that aspect of the business. See, *infra*, Section II.

In particular, *amici* submit that ventures should be most closely scrutinized when they are formed, at the time when the owners' expectations are established and when the degree of permissible limitations on competition between venture participants is delineated. An efficiency-enhancing integration of operations by joint venture participants should be examined under the rule of reason, and harms and benefits should be balanced, as specifically done here by the regulators under the rigorous merger standards of Section 7 of the Clayton Act. However, once the legality of the venture, and its proper scope of operations, has been established, a joint venture in which the participants no longer compete at all in the market should be treated as a single entity when it does no more than the things that it was established (and, in some cases, explicitly approved) to do. Restrictions on the activities of members outside of the venture (such as "loyalty" rules)[5] or restrictions on competition between the venture and its owners,[6] of course, remain subject to rule of reason scrutiny under Section 1. *See*, Section IV, *infra*.

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[5] *See, e.g., United States v. Visa U.S.A. Inc.* 344 F.3d 299 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004).

[6] *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 223-30) (D.C. Cir. 1986) (Bork, J.) (applying ancillary restraints doctrine to prohibition against moving company's agents using joint venture property for non-venture business); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-190 (7th Cir. 1985) (applying ancillary restraints doctrine to limitation on which products joint venturers could sell in their adjacent retail stores).

II. THE SINGLE ENTITY DOCTRINE PLACES A VENTURE'S OWN ACTIVITIES OUTSIDE THE AMBIT OF SECTION 1.

In *Copperweld*, this Court addressed the circumstances in which nominally separate business entities should be treated as a single firm for antitrust purposes. While that decision can be viewed in purely formalistic terms, the underlying rationale of the Court's analysis actually reflects a more important, and normative, rationale: When firms do not possess competing economic incentives, there is no reason to subject their conduct to potential liability under Section 1 of the Sherman Act.

In the course of its *Copperweld* opinion, the Court noted, almost in passing, that joint ventures present a special case with respect to agreements allegedly restraining trade. 467 U.S. at 768. At one end of the spectrum are ordinary (unitary) firms. As a matter of law, they are not engaged in a combination or conspiracy when they conduct their business. Thus, for example, an agreement between a company's Vice-President of Purchasing and its Chief Financial Officer not to buy from a particular firm is not subject to antitrust inquiry because it is considered the act of a single firm, not a group boycott agreement between the two officers. *See Copperweld*, 467 U.S. at 769. The same is true of an agreement between a firm and its wholly-owned subsidiary. *Id.* Having the same owners, those owners are deemed to share the same economic goals and, as such, are incapable of reducing competition by their conduct or agreements.

At the other end of the spectrum, two firms that have no business relationship other than as competitors may not agree to forego competition between themselves whether

as to prices, output, products, customers or sales territories. Such "naked" horizontal agreements can have no effect *other* than to eliminate competition. Therefore, such agreements not only are illegal, they generally are illegal *per se*. *See Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356-57 (1982).

In the middle are joint ventures and, in particular, joint ventures between firms that otherwise compete with one another. The antitrust laws recognize that joint ventures are an important means of achieving pro-competitive efficiencies, and, where that is true, the antitrust laws not only allow a joint venture to be formed to carry out that cooperative activity, but they allow the venture to agree to eliminate competition that otherwise would exist between its owners in order to make their cooperation efficient.

There is no question that there are many instances in which the activities of joint ventures are subject to continuing evaluation under the rule of reason. However, there also are situations in which they should be regarded as single entities.[7] Thus, the critical question is where and how

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[7] For example, this Court observed in *Arizona*, 457 U.S. at 356, that a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . [can be] regarded as a single firm competing with other sellers in the market." Other courts and commentators have expressed similar views. *See Chicago Prof. Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (observing that the NBA may be "best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few market opportunities"); *City of Mt. Pleasant, Iowa v. Assoc. Elec. Coop.*, 838 F.2d 268, 276 (8th Cir. 1988) (holding that Section 1 does not apply to the pricing decisions of an electric cooperative because "the cooperative organization is a single enterprise

to draw a meaningful dividing line between those two approaches.[8] Stated succinctly: When should a decision by a venture be treated as that of a single firm, and when should it be treated as an agreement among the venture's owners?

Copperweld suggests the answer. Where a venture is formed by owners who do not otherwise, or will no longer,

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pursing a common goal."); *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005) (finding different clubs to be single entity because "[b]oth the national club and its affiliates have a common goal—the best interests of the Jack Russell Terrier."); *see also* VII P. Areeda, *Antitrust Law* ¶ 1478c, 355 (1986) ("In general, once a venture is judged to have been lawful at its inception and currently, its decisions should be regarded as those of a single entity rather than the parents' daily conspiracy on every purchase-sale-hiring-licensing choice.") (Professor Hovenkamp employs a slightly different articulation of this principle in his reissue of the classic Areeda treatise. *See* VII Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478c, 325 (2d ed. 2003)). *But see Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147-50 (9th Cir. 2003) (joint venture of associations of realtors not treated as single entity because the associations were actual and potential competitors); *Fraser v. Major League Soccer*, 284 F.3d 47, 57 (1st Cir. 2002) (finding soccer league was a group of separate teams capable of conspiring for purposes of the claims at issue); *North American Soccer League v. NFL*, 670 F.2d 1249, 1256 (2d Cir. 1982) (reversing the district court's finding that NFL acted as a single economic entity).

[8] Rule of reason scrutiny is not free of costs and risks in a competition policy regime that imposes treble damages for virtually all violations and where, as this Court has noted, there are risks of "false positives." *Cf. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("false condemnations 'are especially costly, because they chill'" procompetitive conduct) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). Antitrust policy should not deter parties from collaborating or persuade them to merge instead of forming a joint venture simply to avoid the risk of liability.

compete in the market, there ceases to be different competitive interests as to matters within the scope of the venture.[9] Thus, the fact that venturers previously were competitors as to certain activities that thereafter are permitted to be brought within the scope of the venture is no more relevant to the application of Section 1 than the fact

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[9] There is a second situation—not presented factually by this case—in which single entity analysis would be appropriate. Where firms join together in a network in order to produce products or transactions that are inherently interdependent, such as sports leagues or general purpose credit or debit card transactions, the "network" functions carried out by the venture also should be treated as the activity of a single entity since they, by definition, do not eliminate competition between the venturers that would exist *but for the creation of the venture*. *See NCAA*, 468 U.S. at 99; *Copperweld*, 467 U.S. at 769. To the contrary, those functions exist and need to be performed only because there has been a venture created. Thus, treating the inherently interdependent activities of the venture as the act of a single entity comports fully with the rationale for single entity treatment explained in the text here, albeit in a different context.

This is not to say that the activities of such ventures are immune generally from Section 1 scrutiny. To the contrary, as Judge Easterbrook carefully explained in *Chicago Prof. Sports Ltd. P'ship*, 95 F.3d 593, ventures such as sports leagues or card networks should be treated as single entities when they engage in certain activities that necessarily involve the participation of multiple entities in cooperation, but not when they engage in activities that are merely ancillary to the venture. *See* 95 F.3d at 600. Similarly, as the United States correctly noted in its earlier brief in this case, a Visa rule restricting competition by members outside of the venture properly was subject to rule of reason analysis under the ancillary restraints doctrine. See Br. of U.S. at 14, citing *United States v. Visa U.S.A. Inc.*, 344 F.3d at 243. In that situation, there is no inherent intendependency of function between the venturers and, thus, no reason not to apply normal Section 1 principles. However, the situation is different where the function itself necessarily involves multiple participants in order for the particular activity to occur at all. There, we submit, single entity treatment is called for.

that a parent and its newly-acquired subsidiary may—before their merger—have been competitors generally. Put differently, the role played by "ownership" in the parent-subsidiary context is supplied by the "scope of the venture" in joint venture cases. As to those functions, it is as if there has been a merger between the venturers and the rationale of *Copperweld* applies as fully to such activities as it does to the post-merger conduct of a parent and its subsidiary.

Stated in terms of this case, the Equilon joint venture, in effect, was a complete merger of the companies' downstream operations.[10] Once Texaco and Shell created Equilon, there was no competition (within the scope of the venture) between them, and neither continued to participate at all in the market in which the venture operated. As the United States observed in its brief supporting the petitions for a writ of certiorari: "The creation of the alliance ended competition between Shell and Texaco . . . [and] Texaco and Shell signed non-competition agreements which prohibited them from competing with . . . Equilon." Pet. App. 4a. They were no longer "independent participants in the downstream markets." (Br. of U.S. at 12).

Can it be said, then, that Equilon's pricing of its gasoline had any effect on competition? Not under *Copperweld*, because Equilon's price setting did not "deprive[ ] the mar-

[10] The assets transferred to the joint ventures included "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees." Pet. App. 3a n.3. The venture did not include petitioners upstream business—oil and gas exploration—in the United States nor their upstream and downstream operations elsewhere in the world. Pet. App. 4a & n.1. In those areas, petitioners continued to compete.

ketplace of the independent centers of decision making that competition assumes and demands." *Copperweld*, 467 U.S. at 769; *see also* VII Philip Areeda, *Antitrust Law* ¶ 1462b, 194 (2003) ("Coordination within an otherwise lawful enterprise does not create additional market power or facilitate a restraint"). Again, as decisively put by the United States: "Competition between brands under the exclusive control of a unitary company is not competition with which Section 1 is concerned." Br. of U.S. at 11 (citing *Copperweld*, 467 U.S. at 771).

Under *Copperweld*, there is no legal or economic basis for applying Section 1 to the pricing decisions of a production and marketing joint venture where the venturers have exited the market.[11] A joint venture engaged in the production and marketing of products must be free to do internally those things that are necessary for it to operate and to compete. "[A]ntitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers." *Chicago Prof. Sports Ltd. P'ship*, 95 F.3d at 598. That includes pricing its products. To deny to a production and marketing joint venture the ability to price its own goods is to deny it the right to compete, indeed, to exist. A joint venture's pricing of the things it sells not only is not illegal *per se*, it has no impact on competition and, for that reason, it is not an appropriate subject of antitrust inquiry at all.

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[11] Prior to *Copperweld*, Chief Justice Rehnquist had dissented from denial of certiorari in a joint venture case involving the *National Football League* on the ground that the league should have been treated as a single entity *NFL v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, C.J., dissenting from denial of cert.) ("the league competes as a unit against other forms of entertainment").

Both the FTC and Judge Fernandez, in dissent, believed that Equilon, once formed, should be treated no differently than a single firm when carrying out the functions contemplated (and approved) at its creation. Without using the "single entity" language, the United States apparently accepts that approach as well. *See* Br. of U.S. at 11.

That view is plainly correct. For as Judge Fernandez aptly noted in his dissent, "nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business also prices its own products.... What could be more integral to the running of a business than setting a price for its goods and services?"[12] Pet. App. 34a; *see also* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1906d, 239 (2d ed. 2005). ("[M]any forms of joint marketing require an agreement about the price to be charged."); *see also, id.*, ¶ 1908e at 263-64 ("[A]greements about price are often essential to the administration of certain joint ventures, particularly in

[12] In response to the dissent's sound conclusion that there is nothing radical about an entity pricing its own goods for sale, the Ninth Circuit majority suggested that Texaco and Shell may in fact have "agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance," and that that was not a decision made by a "single economic entity." Pet. App. 19a n.11. But the conclusion does not follow from the facts. Any decision regarding the pricing of Equilon's gasoline, whether made by the venture or its participants, related solely to the venture's operation, and not the participants' separate operations, which were being terminated in the downstream market. As such, it was a decision of a "single economic entity." In any event, even where parties negotiate with one another the terms of a joint venture, that is not price fixing, and it certainly cannot be condemned as *per se* illegal without any consideration of the proposed venture's likely benefits. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

distribution."); *see also* XIII Herbert Hovenkamp, *Antitrust Law* ¶2132(c), 180 (2d ed. 2005) ("joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold"). Moreover, since Texaco and Shell no longer compete in that business in the United States, who other than Equilon *could* price those products for sale? Pet. App. 34a.

In taking up the contrary view, both the court of appeals and the respondents, in their brief opposing the petitions for a writ of certiorari, betrayed a fundamental misunderstanding of joint ventures when they attributed great significance to the fact that the owners of the venture, as opposed to "the venture" itself, priced the gasoline which Equilon sold. *See* Pet. App. at 27a-28a ("The question is whether two former (and potentially future) competitors may create a joint venture in which *they* unify the pricing, and thereby fix the prices, of two of *their* distinct product brands.") (italics added) (underlining in original); Opposition to Petitions for Writ of Certiorari at 10 ("Shell and Texaco agreed to price the Shell and Texaco brands of gasoline at the same price"); *id.* at 11 ("the overall management of Equilon and Motiva rested with Members Committees consisting of representatives of each of the participating oil companies").

When representatives of Shell and Texaco are directing the business of Equilon, the fact is that they are no longer in competition with each other (or with Equilon) in the same market. That they have non-venture business outside (and unaffected by) that market is irrelevant to their efforts to pursue and advance the interest of the venture within the scope of its operations—a realm in which they are not competitors. Here, the gasoline produced and sold *by the*

venture (albeit under two separate licensed trademarks) needed to be priced *by the venture*. The identity of the individuals making that "venture" decision is irrelevant to the question of whether particular activity is venture business within the scope of its operations or not.

In the end, there is no reason to distinguish Equilon—an integrated joint venture carrying out all aspects of the downstream gasoline business in competition with other sellers—from other competitors based simply on its genesis or its structure. *See Chicago Prof. Sports Ltd. P'ship*, 95 F.3d at 598; *Arizona*, 457 U.S. at 356. This Court eschewed a "form over substance" approach in *Copperweld*, stating that "[t]he economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition." 467 U.S. at 772. Stated otherwise, "antitrust policy should not bias the selection of a form of business organization by entrepreneurs and investors." H. Chang, D. Evans and R. Schmalensee, *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 262 (1998).[13] But to give meaning to these sentiments, it is essential that joint ventures not be casually subjected to antitrust scrutiny regardless of context and regardless of whether there is reason to do so in the sense of economic unity recognized in *Copperweld*. Unless joint ventures are recognized as single economic entities when doing the things they were created to do—competing in the

[13] *See also Copperweld*, 467 U.S. at 773: "Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability."

same way as other corporations—their viability as a co-equal form of industrial organization will be severely, and needlessly, compromised.

III. COMPETITIVE EFFECTS SHOULD BE ASSESSED AT THE TIME A JOINT VENTURE IS ESTABLISHED.

The fact that the Equilon joint venture now exclusively markets Texaco and Shell brand gasoline in the western United States does not mean that the decision to allow it to do so was (or should be) immune from competitive analysis. In fact, that analysis needed to be undertaken at the time the venture was formed including any questions about the intended inclusion of marketing as part of the venturers' proposed partial "merger."

The creation by competitors of an efficiency-enhancing joint venture always is subject to a rule of reason analysis under Section 1. "[M]ergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, formation of such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect." *Copperweld,* 467 U.S. at 768; *see also* VII Philip E. Areeda, *Antitrust Law* ¶ 1478, 318 (2d ed. 2003). The formation of a joint venture has also been analyzed under Section 7 of the Clayton Act, subject to its requirements and burdens of proof, and taking into account the venture's purpose as well as its potential effects on competition. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158. Private plaintiffs and regulators should have the opportunity to bring a timely challenge to the partici-

pants' claims regarding the potential benefits of a joint venture, its proposed scope of operations and its likely impact on competition.[14]

In this case, to reduce costs and maximize efficiencies, Equilon was created by Shell and Texaco to carry out all aspects of their downstream gasoline business. Equilon (along with Motiva, which is no longer a part of this case, *see* Pet. App. 9a-11a) was formed from virtually all of the companies' downstream assets. Pet. App. 3a n.3. In contrast to more limited joint ventures set up, for example, only to conduct research, engage in marketing or produce goods, Equilon was formed to own and operate *all aspects of the business*, from the refineries to the stations to the gas pumps.

Every aspect of Equilon's proposed operations was open to review by the FTC and various state Attorneys General. Among other factors, the FTC considered the parents' market shares; the concentration in the market (HHI); barriers to new entry; the likelihood of price collusion on activities *outside* the venture's scope; and other similar factors bearing on the likely effect on competition that might result

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[14] The statute of limitations requires private plaintiffs to bring a claim for damages within four years of formation. Clayton Act Section 4b, 15 U.S.C. 15b. Later claims may be possible under certain circumstances. "Clayton Act claims are not limited to challenging the initial acquisition of stocks or assets . . . since 'holding as well as obtaining assets' is potentially violative of Section 7." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1050 (8th Cir. 2000), *cert. denied*, 531 U.S. 979 (2000), quoting *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 240 (1975). The government remains free to challenge a joint venture under Section 7 of the Clayton Act "at any time when a threat of the prohibited effects is evident," even decades later. *United States v. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957).

from formation of the venture. The likelihood that the venture would achieve cost savings and other efficiencies that could benefit consumers also would have been considered. Based on its review, the FTC (joined by certain state Attorneys General) identified a number of areas of competitive concern. These included: refining of gasoline and kerosene jet fuel in Puget Sound; refining of gasoline and kerosene jet fuel in the Pacific Northwest; refining of CARB gasoline in California; transportation of refined light petroleum products to the inland Southeast; the wholesale and retail sales of CARB gasoline in San Diego County; and terminaling, wholesale and retail sales of gasoline and diesel fuel in Hawaii. Accordingly, the FTC sought and obtained divestitures to remedy overlaps between Shell and Texaco in these markets. *See In The Matter of Shell Oil Company, et al.*, 125 F.T.C. 769, Consent Order (April 21, 1998); *see also* Pet. App. 3a.

The FTC's investigation focused on the actual market effects of the venture, not on the way in which it was going to price its gasoline. Although the decision to include marketing within the venture surely was open to review and challenge at that time (along with any other element of the proposed integration) nothing in the FTC's Complaint or in the Consent Order resolving the case suggests that the Commission was concerned that Equilon would be responsible for the downstream sale of both Texaco and Shell-branded gasoline, including the wholesale pricing of that gasoline. To the contrary, the Commission chose to treat the proposed venture as, in effect, a merger of the venturers' downstream businesses and, on that basis, chose to approve their integration. Indeed, as the FTC later explained in a case involving a subsequent merger by Texaco: "For antitrust purposes, the Commission evaluat-

ed the formation of the Alliance [Equilon and Motiva] as if it were a complete merger of the downstream operations of Texaco and Shell.... In all subsequent oil merger investigations undertaken by the Commission, we have considered Texaco and Shell to be a single entity when evaluating downstream market concentration." *In The Matter of Chevron Corporation, a corporation, and Texaco Inc., a corporation,* Docket No. C-4023 (January 2, 2002), Statement of Commissioners Anthony and Thompson.

This analysis is consistent with the approach set forth in the DOJ and FTC's joint *Guidelines*, which explain the circumstances under which it is appropriate to "treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the *Horizontal Merger Guidelines*." In fact, *Example 1* under the *Guidelines* involves treating as a merger the collaboration of "[t]wo oil companies [that] agree to integrate all of their refining and refined product marketing operation." *See Example 1.*[15]

The decision of the court of appeals in this case revisits the formation decision *sub silentio*. Moreover, it does so without a proper invitation and on an utterly inappropriate basis. The issue here is not price fixing, it is the validity and permissible operational activities of the venture. In

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[15] *See also* XIII Herbert Hovenkamp, *Antitrust Law* ¶2137c2, 239-40 (2d ed. 2005) ("A horizontal agreement providing for complete integration of distribution and sales can produce significant savings and generally cannot harm competition more than a complete merger of its participants."); *see also* Werden, 66 Antitrust L.J. at 715-16 ("Many transactions reasonably termed joint ventures by their participants have been treated as mergers under the antitrust laws. A joint venture relating to but one of many activities of its participants still may be properly analyzed as a horizontal acquisition with respect to that one activity.").

reality, the respondents' challenge to Equilon's pricing of the gasoline it produces, transports and sells, is not simply a challenge to a policy decision of an integrated joint venture. Rather, it is an attack on one of the *raisons d'etre* of Equilon: to compete as a seller in the downstream gasoline business. Respondents could have challenged, under the appropriate standards, the inclusion of the marketing function in the permitted scope of integration of the venture at the time of its formation, or, thereafter, where warranted by changed conditions. But it is utterly inappropriate to bring that challenge to the formation or scope of the venture as a Section 1 price-fixing claim. If the respondents wanted to mount that after-the-fact attack on the scope of the venture, they needed to do so directly and by appropriate means, *i.e.*, a rule of reason challenge under either Section 1 of the Sherman Act or Section 7 of the Clayton Act.

Had *that* challenge been raised, the court would have needed to carefully analyze the benefits and costs imposed by allowing Shell and Texaco to include marketing as a part of their venture as well as various other issues that are presented when a court is asked, after the fact, to decree what amounts to partial divestiture of a previously consummated merger. *See* V P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 1205, 296 (2d ed. 2003). Moreover, the usual burdens would apply, and respondents would have had to prove that formation of the venture would have led to higher prices in a relevant market. Under the court of appeals' approach, that burden was shifted to the petitioners, who purportedly were unable to "offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies." Pet. App. 23a.

Amici have a strong intuition about how such a claim would have been resolved, had it been made. (Indeed, the very fact that it was not made, and that respondents chose, instead, to rest their case solely on a misplaced *per se* price-fixing theory strongly suggests that respondents share that intuition.) But that is not the point. The point is that allowing a challenge to formation and scope issues to be analyzed as *per se* price fixing when a venture sets the price of its products is fundamentally misdirected as a matter of antitrust policy towards joint ventures.

IV. THE ANCILLARY RESTRAINTS DOCTRINE IS IMPORTANT IN MANY JOINT VENTURE CASES BUT IT HAS NO APPLICATION HERE.

It is well understood by *amici* that the legitimacy of a joint venture does not give its members license to adopt rules unrelated to the objective of the joint venture or that unreasonably impact competition outside of its scope. A joint venture's rules must be related to the nature, and needs, of the venture. However, in order to achieve the efficiencies for which it was formed, certain agreements restricting the participants' competition with the venture, or outside the venture, must be established. "The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 729 n.3 (1988).

Restrictions that are reasonably "ancillary" to the functions of a lawful joint venture are themselves lawful. *See, e.g., Rothery*, 792 F.2d at 210 (Bork, J.). A restraint is "ancillary" if it can be defended on the ground that it makes the venture more effective in carrying out the pur-

poses for which it was formed. *Id.*[16] In *Rothery*, 792 F.2d 210, for example, Atlas, a national van line that contracted with numerous local agent-carriers, prohibited its members from competing with the association. Agent-carriers were required to bring within the venture all of their interstate carriage that used Atlas's equipment, uniforms, services or other network assets. Judge Bork upheld the restriction under the rule of reason as a reasonably necessary ancillary restraint that eliminated free-riding and preserved the efficiencies of the venture. *Id.* at 229.[17]

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[16] Loyalty, or exclusivity, rules were the paradigmatic example of an ancillary restraint referred to by Judge Taft in *Addyston Pipe*: "Restrictions in [a partnership agreement] . . . with a view of securing [the partners'] entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged." *Addyston Pipe & Steel Co.*, 85 F. at 280 (emphasis added).

[17] *See also* the discussion of cases by the United States at Br. of U.S. at 13-15, including: *United States v. Visa U.S.A. Inc.*, 344 F.3d at 243 (charge card joint venturers required to demonstrate reasonable necessity of agreement that members not issue certain competing cards); *Blackburn v. McSweeney*, 53 F.3d 825 (7th Cir. 1995) (lawyers dissolving partnership required to demonstrate reasonable necessity of agreed-upon territorial restrictions on advertising by former partners); *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984) (truck leasing companies that agree to provide service for each others' trucks must demonstrate the reasonable necessity of adopting territorial restrictions on leasing competition); *Polk Bros., Inc.*, 776 F. 2d at 188-190 (applying ancillary restraints doctrine to limitation on which products joint venturers could sell in their adjacent retail stores); *NFL*, 459 U.S. at 1077-1078 (Rehnquist, C.J., dissenting from denial of certiorari) (applying ancillary restraints doctrine to a sports league's restraint on members' ownership of other sports teams); *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 613 (1972) (Burger C.J. dissenting) (applying ancillary restraints doctrine to territorial restrictions on members' ability to sell products supplied by venture).

Conversely, restrictions that are insufficiently related to the purposes of the joint venture, or that unnecessarily restrict the participants' non-venture output, will be struck down as anticompetitive under the rule of reason.[18] Thus, in *Three Tenors*, the FTC, affirmed by the D.C. Circuit, held that two record companies that formed a joint venture to market a new album by the Three Tenors (3T3) could not justify a moratorium *by the venturers* on promoting or discounting earlier Three Tenors albums (3T1 and 3T2) that were not, themselves, a part of the joint venture.[19] Then-Chairman Muris held that the joint venture participants, Polygram and Warner, "cannot claim the integrative efficiencies that could conceivably have been brought about by combining the production and marketing of all Three Tenors products. Accordingly, the restrictions on the marketing of 3T1 and 3T2 cannot be considered 'ancillary' to the present joint venture, *as a matter of law*, because they are not related to the efficiencies the joint venture was created to produce."[20] 2003 FTC Lexis at *94 (emphasis in original).

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[18] As explained by the United States:

> [C]ourts have regularly applied the ancillary restraints doctrine to agreements respecting joint venture participants' conduct outside of the joint venture. Some courts have also applied the doctrine to restraints on admission to joint venture membership. But so far as the United States is aware, the court of appeals' decision in this case is the first ruling to apply the ancillary restraints doctrine to constraints on the joint venture's *own* conduct.

Br. of U.S. at 15 (emphasis in original).

[19] The case was brought under Section 5 of the FTC Act, 15 U.S.C. 45, but that is of no consequence for the purposes of this discussion.

[20] Chairman Muris pointedly contrasted the restraint at issue in the *Three Tenors* with *General Motors Corp.*, 103 FTC 374 (1984), in which General Motors and Toyota engaged in a production joint venture, but limited their pricing agreement to the output of the venture. *Three Tenors*, 2003 FTC LEXIS at *88.

Amici agree fully with the United States that "[t]he ancillary restraints doctrine simply has no role to play in this case," Br. of U.S. at 16, although it obviously remains an important principle in joint venture cases.[21] For reasons explained previously, the agreement at issue here—the pricing of the gasoline the venture was established to produce and sell—had no impact on competition between the joint venture participants, or between the venture and its owners. As discussed in the preceding section, Equilon's pricing of its own gasoline had no effect on competition in any manner relevant to Section 1. In this case, therefore, the single entity analysis provides a complete answer. Accordingly, it was inappropriate and incorrect for the court of appeals to require petitioners to justify their "price-fixing" arrangement by showing that the agreement was "ancillary" to and "reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 21a. No such justification was necessary, because the venture's pricing decisions were not price fixing at all, at least not in any sense of the word that is relevant under Section 1.

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[21] In suggesting that this case does not present an ancillary restraint issue, *amici* by no means intend to disagree with the analysis set forth in the separate briefs of other *amici*, regarding the manner and circumstances in which the rule of reason ought to be applied, were one to get beyond the single-entity issue. However, for the reasons explained in text, *supra*, we believe that it was unnecessary to reach that issue in the present case. We further believe that, while it would be salutary for this Court to declare that the rule of reason and ancillary restraint doctrine have the broad scope and applicability suggested by other *amici*, it would be equally beneficial (and more appropriate to the facts of this case) to reverse based on single-entity principles.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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Supreme Court of the United States

TEXACO, INC.,
Petitioner,

v.

FOUAD N. DAGHER, ET AL.,
Respondents.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioners. Petitioners have consented to the filing of this brief; their letters of consent have been filed with the Clerk of the Court. Counsel for respondents declined to give consent, thereby necessitating this motion.

WLF is a public interest law and public policy center based in Washington, D.C., with supporters nationwide. Although it participates in litigation and regulatory proceed-

ings in a variety of areas, WLF devotes a substantial portion of its resources to the defense of free enterprise, individual rights, and a limited and accountable government. To advance these ends, WLF has appeared as *amicus* in several antitrust cases before this Court and other federal courts. *See, e.g.*, *Verizon Commc'ns, Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *United States Tobacco Co.* v. *Conwood Co.*, *cert. denied*, 537 U.S. 1148 (2003); *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003). WLF also filed a brief as *amicus curiae* in support of the petitions for certiorari in the present cases.

WLF is concerned that by establishing per se antitrust liability for the normal and legitimate business decisions of joint ventures, the judgment of the court of appeals, if not reversed by this Court, will chill the formation of joint ventures that are an increasingly important source of economic growth and innovation. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

In light of its interests and experience, WLF respectfully moves that the Court grant leave for WLF to submit this brief *amicus curiae*, urging this Court to reverse the judgment of the Ninth Circuit.

Respectfully submitted.

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TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS i

TABLE OF AUTHORITIES vii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. SECTION 1 OF THE SHERMAN ACT DOES NOT APPLY TO THE PRICING DECISIONS OF A FULLY INTEGRATED JOINT VENTURE 5

A. Section 1 Applies Only To Concerted Activity And Does Not Extend To Unilateral Conduct 5

B. The Pricing Decisions Of A Fully Integrated Joint Venture Are Unilateral Conduct 6

C. Imposing Section 1 Liability On The Pricing Decisions Of A Fully Integrated Joint Venture Will Discourage An Important Form Of Business Organization 11

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT A JOINT VENTURE'S PRICING OF ITS OWN OUTPUT COULD BE A PER SE ILLEGAL "NAKED" RESTRAINT 14

A. Per Se Illegality Is A Narrow Exception To The Rule Of Reason 16

TABLE OF CONTENTS—Continued

Page

B. An Agreement Between The Owners Of A Fully-Integrated Joint Venture Regarding The Venture's Output Can Not Be A Per Se Unlawful Horizontal Price-Fixing Agreement Because It Is Not An Agreement Between Competing Sellers 21

C. An Alleged Restraint Cannot Be Per Se Unlawful So Long As It Arguably Furthers The Legitimate Objectives Of A Bona Fide Joint Venture 22

D. Petitioners' Policy Of Charging The Same Prices For Their Two Brands Of Gasoline Was Not A "Naked" Restraint Of Trade 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Page(s)

Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) 6, 7, 13, 14, 18
Augusta News Co. v. *Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001) 21
Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ..... *passim*
Business Electronics Corp. v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988) 18, 27
California Dental Ass'n v. *FTC*, 526 U.S. 756 (1999) ..... *passim*
Chicago Professional Sports Ltd. Partnership v. *National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) 9, 10
Citizen Publishing Co. v. *United States*, 394 U.S. 131 (1969) 4, 20
City of Mount Pleasant v. *Associated Electric Co-operative, Inc.*, 838 F.2d 268 (8th Cir. 1988) 9
Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) 17, 18, 26
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) ..... *passim*
FTC v. *Borden Co.*, 383 U.S. 637 (1966) 27
FTC v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986) 19
Fraser v. *Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002) 13
Freeman v. *San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003) 7, 8
Hawaii Newspaper Agency v. *Bronster*, 103 F.3d 742 (9th Cir. 1996) 21
In re Shell Oil Co., 125 F.T.C. 769 (1998) 3
In re Standard Oil Co., 49 F.T.C. 923 (1953) 27
Jefferson Parish Hospital District No. 2 v. *Hyde*, 466 U.S. 2 (1984) 3, 18
Law v. *NCAA*, 134 F.3d 1010 (10th Cir. 1998) 18, 19

TABLE OF AUTHORITIES—Continued

Page

NCAA v. *Board of Regents*, 468 U.S. 85 (1984) ..... *passim*
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 16
Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) 15, 18, 22, 23
Palmer v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) 13
Polk Bros., Inc. v. *Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985) 22, 28
Polygram Holding, Inc. v. *FTC*, 416 F.3d 29 (D.C. Cir. 2005) 20
Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) 7, 11, 21
SCFC ILC, Inc. v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) 7, 22
Schering-Plough Corp. v. *FTC*, 402 F.3d 1056 (11th Cir. 2005), *pet'n for cert. filed*, ___ U.S.L.W. ___ (Aug. 29, 2005) (No. 05-273) 15, 19, 28
Standard Oil Co. of New Jersey v. *United States*, 221 U.S. 1 (1911) 16, 19
State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 16, 17, 18
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 13
United States v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899) 24, 28
United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1968) 17
United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) 12
United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963) 3
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 16, 27
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TABLE OF AUTHORITIES—Continued

Page

United States v. *Visa USA, Inc.*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004) 19
Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) 10, 26, 29
White Motor Co. v. *United States*, 372 U.S. 253 (1963) 15, 23

STATUTES AND REGULATIONS

Sherman Act
15 U.S.C. § 1 5
15 U.S.C. § 2 6
Robinson-Patman Act
15 U.S.C. § 13(a) 27
In re Chevron Corp., Analysis to Aid Public Comment, 66 Fed. Reg. 48,136 (Sept. 18, 2001) 7
In re Shell Oil Co., Analysis to Aid Public Comment, 62 Fed. Reg. 67,868 (Dec. 30, 1997) 3

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TABLE OF AUTHORITIES—Continued

Page

FTC & DOJ, *Antitrust Guidelines for Collaboration Among Competitors* (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf 12

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Amicus Curiae Washington Legal Foundation (WLF) respectfully submits this brief in support of the petitioners.

INTEREST OF *AMICUS CURIAE*[1]

WLF is a public interest law and public policy center based in Washington, D.C., with supporters nationwide. The interests of *amicus* are set out in the motion for leave to file this brief.

STATEMENT

This case presents an opportunity to clarify issues of antitrust law of substantial importance to the formation of joint ventures that contribute to innovation and economic growth in many sectors of the global economy.

1. The joint venture is an increasingly common form of business organization, because it offers "significant transactional advantages" and "allow[s] substantial efficiencies of integration to be achieved." Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Geo. L.J. 1605, 1606-1607 (1986); *see* Chang et al., *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, Colum. Bus. L. Rev. 223, 228-229 (1998). Joint ventures can create additional productive capacity, facilitate research and development, generate efficiencies through economies of scale and scope, achieve synergies through the pooling of complementary assets and skills, minimize waste through the elimination of duplicative operations, and diversify risk. *See id.* at 237-238; Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 702 (1998). Joint ventures—especially cross-border collaborations—in industries as diverse as pharmaceuticals, energy, information technology, and manufacturing play an increasingly important role in facilitating global integration and economic growth. *See* Chang et al., *supra*, at 233-236.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief either in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to either the preparation or the submission of this brief.

2. The joint ventures—Equilon Enterprises and Motiva Enterprises—formed by petitioners exemplify the type of welfare-enhancing, "fully integrated" joint venture that antitrust policy should embrace, not punish. "A joint venture is fully integrated when it encompasses all aspects of a line of business, including manufacturing, distribution, marketing, and sales." ABA Section of Antitrust Law, *Antitrust Law Developments (Fifth)*, at 418 (2004). Here, the Ninth Circuit conceded that Equilon and Motiva represented a complete integration of the downstream gasoline refining and marketing operations of the petitioners. Pet. App. 3a. The petitioners further agreed to share the profits of the joint ventures in fixed ratios based on the assets each contributed to the joint ventures.[2] Pet. App. 4a-5a. Upon the formation of these ventures, petitioners ceased separate refining and marketing of gasoline within the United States and hence ceased competing against each other in those operations. *Id.* at 44a.

The Ninth Circuit and the district court agreed that Equilon and Motiva "produced sufficient efficiencies and were sufficiently integrated to constitute indisputably legitimate joint ventures." Pet. App. 8a. These efficiencies, which included up to $800 million in cost savings annually (*id.* at 3a-6a), would benefit consumers by enabling the ventures to compete more effectively against other larger competitors, such as Exxon, Mobil, and Chevron.

While combining their domestic downstream refining and marketing operations, Shell and Texaco continued to operate separately in downstream gasoline operations in other countries, in refining and marketing of other fuels worldwide, and in domestic and foreign upstream exploration and production operations. Also, while expecting the combination to be permanent, each parent retained the right

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[2] The assets petitioners contributed to Equilon and Motiva are undeniably substantial: 12 refineries, 23 lubricant plants, two research laboratories, 22,000 service stations, more than 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees. Pet. App. 3a n.3.

to terminate the ventures either by mutual consent or unilaterally (after five years) and to reenter the domestic downstream market on its own, if the venture did not perform to its satisfaction. Pet. App. 4a. Shell and Texaco, therefore, each retained ownership of their respective brand names and trademarks and agreed that the joint ventures would continue to market gasoline under both brands. *Id.* The agreements prohibited the joint ventures from giving preferential treatment to either brand, thereby protecting the valuable goodwill in those well-known brands. *Id.* The joint ventures also adopted as an operating principle a policy of charging the same price for both brands of gasoline where they were sold in the same geographic market (*id.* at 4a-5a), in order to mitigate the risk of potential litigation under the Robinson-Patman Act that differential pricing might otherwise have created.

The Federal Trade Commission and the Attorneys General of four States recognized the potential procompetitive benefits of the two ventures and cleared both ventures, subject to very limited divestitures, after a thorough review. *In re Shell Oil Co.*, 125 F.T.C. 769, 777-793 (1998). The FTC concluded that these divestitures "alleviate[d] the alleged competitive concerns arising from the Joint Venture." *In re Shell Oil Co., Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868, at 67,869 (Dec. 30, 1997).[3]

3. Notwithstanding the determination by both federal and state antitrust enforcement authorities that the ventures would not substantially lessen competition, respondents brought a putative class action on behalf of 23,000 gas station owners, alleging that the joint ventures' uniform

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[3] Petitioners agreed to divest one refinery, one terminal, and several retail gasoline stations. The ventures' resulting market share nationwide was only 15% and was just over 25% in the western United States. Pet. App. 3a. These shares are well below the threshold necessary to give the ventures market power under this Court's decisions. *See Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 26-27 & n.43 (1984); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 365-366 (1963).

pricing of Shell and Texaco brand gasoline was horizontal price fixing, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Pet. App. 1a. The respondents' complaint disavowed reliance on the rule of reason and asserted instead that the uniform pricing policies were unlawful under either the per se doctrine or a "quick-look" review. *Id.* at 37a. Both petitioners and respondents moved for summary judgment, and the district court granted judgment to petitioners (*id.* at 36a-61a), holding that the joint ventures' uniform pricing policies were not per se unlawful under § 1.

A divided panel of the Ninth Circuit reversed the district court's judgment. Relying principally on *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), Judge Reinhardt, writing for the majority, held that it would be per se unlawful for the owners of a joint venture to agree to charge a single price for the venture's products, if they are sold under "two distinct brands" (Pet. App. 5a), unless the owners could prove that uniform pricing was "reasonably necessary" to achieve the legitimate procompetitive goals of the joint venture (*id.* at 21a).

Judge Fernandez dissented from that holding, arguing that an agreement between the owners of a "true, bona fide economically integrated joint venture" (Pet. App. 31a) regarding the price the joint venture charged for its own output could not give rise to per se liability under § 1: "What could be more integral to the running of a business than setting a price for its goods and services?" *Id.* at 34a. This Court granted a writ of certiorari to decide whether it can ever be per se illegal under § 1 for an economically integrated joint venture to set the price of its own output.

SUMMARY OF ARGUMENT

1. Section 1 of the Sherman Act does not apply to the decisions of a bona fide, fully integrated joint venture about the pricing of its own products. Such decisions are economically indistinguishable from the pricing decisions of a merged entity, which undeniably constitute unilateral conduct outside the scope of § 1. To subject the pricing deci-

sions of a fully integrated joint venture to treble damages and potential criminal penalties under § 1, as the Ninth Circuit has done here, will discourage the creation of enterprises that produce substantial benefits to American consumers. This Court should accordingly reverse the Ninth Circuit's judgment and hold that § 1 is inapplicable to the pricing decisions of a fully integrated joint venture.

2. Even if § 1 applies to such decisions, the per se rule certainly does not. The Ninth Circuit's conclusion that it can be per se unlawful for a fully integrated joint venture to set a price for the venture's separately branded products, if not reversed by this Court, will expose joint venture partners to a significant risk of per se antitrust liability that cannot be justified under either this Court's precedents or any coherent economic theory.

ARGUMENT

I. SECTION 1 OF THE SHERMAN ACT DOES NOT APPLY TO THE PRICING DECISIONS OF A FULLY INTEGRATED JOINT VENTURE

The Sherman Act draws a "basic distinction between concerted and independent action." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). The decision of a bona fide, fully integrated joint venture as to the prices it will charge for its own output constitutes independent, unilateral economic activity, which lies outside the scope of § 1. Subjecting such basic operational decisions of a joint venture to scrutiny under § 1 would be economically irrational and would chill incentives to form ventures that contribute to global economic growth.

A. Section 1 Applies Only To Concerted Activity And Does Not Extend To Unilateral Conduct

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." By its terms, § 1 applies only to concerted activity and "does not

reach conduct that is 'wholly unilateral.'" *Copperweld*, 467 U.S. at 768 (quoting *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149 (1968)). As this Court explained in *Copperweld*, concerted activity "is fraught with anticompetitive risk," because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." 467 U.S. at 768-769. Although unilateral conduct may also harm competition, it is likely to do so only when the single firm "threatens actual monopolization." *Id.* at 767. Hence, unilateral conduct is subject to liability only under § 2 of the Sherman Act.[4]

The metric for determining whether conduct is concerted or unilateral accordingly centers on whether the conduct "deprives the marketplace of the independent centers of decisionmaking that competition assumes." *Copperweld*, 467 U.S. at 769. A restraint that "do[es] not suddenly bring together economic power that was previously pursuing divergent goals," *id.*, is "not an activity that warrants § 1 scrutiny," *id.* at 771. In *Copperweld*, this Court held, therefore, that a parent and its wholly owned subsidiary are incapable of conspiring to violate § 1. *See id.*

B. The Pricing Decisions Of A Fully Integrated Joint Venture Are Unilateral Conduct

1.a. A fully integrated joint venture, which combines the substantial assets of the venturers, is in economic function identical to an entity formed by a merger. In "such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market." *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982). In contributing all of their downstream assets to Equilon and Motiva, the petitioners simultaneously ended their independent participation in the downstream market—just as if the

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[4] Section 2 renders it unlawful for any person "to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2.

transaction were structured as a merger. Equilon and Motiva, although labeled as joint ventures, were therefore economically indistinguishable from a merger. *See Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 230 (D.C. Cir. 1986) ("A joint venture made more efficient by ancillary restraints, is a fusion of the productive capacities of the members of the venture. That, in economic terms, is the same thing as a corporate merger."); *see also SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994) ("[E]fficiencies created by joint ventures are similar to those resulting from mergers—risk-sharing, economies of scale, access to complementary resources and the elimination of duplication and waste."). "This reality must control, rather than the organizational form chosen by the enterprise, for that form reflects valid management purposes without increasing any anticompetitive potential." VII Areeda & Hovenkamp, *Antitrust Law* ¶1463h, at 203 (2d ed. 2003).

b. Where, as here, the parties to a fully-integrated joint venture share the aggregate profits or losses of the venture in a fixed ratio, the venturers have a unity of economic purposes insofar as pricing and output decisions of the venture are concerned and, therefore, do not pursue "separate economic interests."[5] *Copperweld*, 467 U.S. at 769, 771. Such an "agreement to divide profits and losses" means the venturers "function as an economic unit and are generally treated as a single entity." *Freeman* v. *San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 (9th Cir. 2003); *see Maricopa County*, 457 U.S. at 356 (single entity rule applies to "joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit").

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[5] Indeed, upon the subsequent merger of Chevron and Texaco in 2002, the FTC permitted Shell to buy out Texaco's interests in Equilon and Motiva because the assets of the two ventures were already "under common ownership and control, and divestiture of these interests to Shell . . . would closely maintain the situation that currently exists." *In re Chevron Corp., Analysis to Aid Public Comment*, 66 Fed. Reg. 48,136, at 48,143 (Sept. 18, 2001).

c. Although the act of combining "two erstwhile competitors" in a joint venture, as Shell and Texaco did in forming both Equilon and Motiva, is subject to § 1, *Freeman*, 322 F.3d at 1147, neither the respondents nor the Ninth Circuit dispute the legality of the formation of the two joint ventures. Once a joint venture is formed, the venture's post-formation pricing of its own output does not result in any further loss of "independent centers of decisionmaking." *Copperweld*, 467 U.S. at 769; *see* Werden, *supra*, at 705 n.18 ("Such an 'agreement on price' does not eliminate independent decision making among competitors, and thus is not even akin to price fixing.").

As the leading treatise in the field persuasively argues, "[O]nce a firm is lawfully created, we focus on its behavior rather than that of its original creators." VII Areeda & Hovenkamp, *supra*, ¶1462a, at 193; *see id.* ¶1476a, at 306 ("Once lawfully formed, the corporation's acts are those of a single entity."). Indeed, "it would be inconsistent to prevent [a joint venture] from functioning by characterizing its normal operations as per se or otherwise unlawful conspiracies." *Id.* ¶1475b, at 304; *see* Werden, *supra*, at 704-705 ("[A] joint venture, once formed, necessarily acts as a single economic entity. When a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity.").

Acknowledging that "of course . . . joint ventures may price their products," the Ninth Circuit distinguished this case from that concededly legitimate practice by observing that there was some evidence in the record that petitioners agreed to charge uniform prices for Shell and Texaco brand gasoline at the time the venture was formed, instead of leaving that decision to the venture itself. *See* Pet. App. 5a n.4, 19a n.11, 27a. This "distinction" elevates form over substance.

Where the owners of a joint venture have exited the market in which the venture competes, an agreement between the owners regarding the pricing of the venture's output is no more concerted action within the meaning of § 1

than is a decision by the partners in a new law firm as to the rates the firm will charge for their legal services. Because those pricing decisions do not affect the behavior of the participants in their nonventure business, they should generally be "regarded as those of a single entity rather than the parents' daily conspiracy." VII Areeda & Hovenkamp, *supra*, ¶1478c, at 325. In contrast to an agreement among the parties to a joint venture as to the prices the parties will charge for their respective output prior to the consummation of a transaction, decisions regarding the price of the venture's own post-formation output, even if reached at the time the venture is formed, do not "deprive[] the marketplace," *Copperweld*, 467 U.S. at 769, of any additional increment of independent decisionmaking beyond that lost through the formation of the joint venture. Whether these decisions are reached during pre-closing integration planning or shortly after the venture is formed is of no moment; such decisions implicate none of the special "anticompetitive risk[s]" associated with concerted activity, *id.* at 768-769. Therefore, treating these decisions as concerted activity would not advance the "statutory policy distinguishing unilateral from concerted behavior." VII Areeda & Hovenkamp, *supra*, ¶1476a, at 306.

2. Holding that § 1 does not apply to a decision by the owners of a joint venture as to the pricing of the venture's output would not exclude the application of § 1 to other agreements between the owners that do have the potential to restrain trade. Federal appellate courts have correctly recognized that the conduct of a joint venture may be treated as that of a single entity when it relates to the sale of a venture's own output, but as concerted action when it curtails competition among the joint venture partners themselves. *See Chicago Prof'l Sports Ltd. P'ship* v. *National Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (NBA may be "best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment," but as a concert of multiple firms "when curtailing competition for players who have few other market opportunities"); *City of Mount Pleasant* v. *As-*

sociated Electric Cooperative, 838 F.2d 268, 276 (8th Cir. 1988); *see also* VII Areeda & Hovenkamp, *supra*, ¶1478a, at 319 (characterization as a single entity "seems appropriate for venture activities not governing the members' conduct, while the 'continuing conspiracy' answer seems wise for rule-making activities and for those developments which could make continued collaboration unreasonable for the future").

3. Finally, the panel majority contends that setting different prices for Shell and Texaco brand gasoline would have been competitively preferable to setting a uniform price for both products. Pet. App. 23a-24a. It is entirely irrelevant under § 1 whether joint venturers set a single price or different prices for the venture's own output; the competitive concern under § 1 is whether the pricing policies "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands," *Copperweld*, 467 U.S. at 769, not whether those pricing policies are, in some sense, optimal.

As this Court recently emphasized, the Sherman Act "is indeed the 'Magna Carta of free enterprise,'" but it does not empower judges to condemn behavior whenever they suspect that "some other approach might yield greater competition." *Verizon Commc'ns, Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415-416 (2004) (quoting *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)). The owners of a joint venture should be free to exercise their business judgment as to the pricing of the venture's output unhampered by judicial second-guessing of their decisions under § 1. *See Chicago Prof'l Sports*, 95 F.3d at 597 ("[T]he antitrust laws do not deputize district judges as one-man regulatory agencies.").

What is "competitively preferable" is obviously in the eyes of the beholder. It may well be, for example, that some partners in a law firm would prefer to charge lower rates for their services than other partners in the same firm, given different supply and demand conditions in, say, the market for antitrust advice and the market for securities advice. No

one would suggest that an agreement among a law firm's partners to charge a uniform rate for their services should be considered illegal concerted activity under § 1, notwithstanding such differing preferences. *See Rothery*, 792 F.2d at 224 n.10 ("Although literally price fixing among competitors, fee schedules imposed by a law partnership are accepted, even taken for granted."). There is no reason to treat the pricing decisions at issue here any differently.

C. Imposing Section 1 Liability On The Pricing Decisions Of A Fully Integrated Joint Venture Will Discourage An Important Form Of Business Organization

"[A] business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability." *Copperweld*, 467 U.S. at 773. The Ninth Circuit's decision, however, imposes liability on a pure matter of business judgment—the pricing of a joint venture's own output—that would be beyond the reach of regulatory scrutiny under § 1 had the parties simply structured their transaction as a "merger" rather than a "joint venture." *Cf. id.* at 772 ("Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary."). That result "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of joint venture transactions. *Id.* at 774.

1. Antitrust liability distorts economic incentives to engage in business transactions if courts apply it in ways that treat economically similar entities dissimilarly. *See generally* Shapiro & Willig, *On the Antitrust Treatment of Production Joint Ventures*, 4 J. Econ. Persp. 113 (1990). Subjecting bona fide, economically integrated joint ventures, such as Equilon and Motiva—which are functionally identical to merged entities, and which were treated as such by both the FTC and state attorneys general—to antitrust standards different from those applied to merged entities may discourage use of the joint venture form in order to

minimize the expected cost of antitrust liability.[6] *See* Chang et al., *supra*, at 263-264 ("Antitrust policy that places joint ventures at a competitive disadvantage would artificially reduce the incentives of entrepreneurs and investors to choose this organizational form in the first place."); *cf. United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158, 170 (1964) ("Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy . . . to preserve and promote a free competitive economy.").

This distortionary effect is sub-optimal because it discourages business parties from choosing the most efficient organizational form for their transaction. *See* Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1, 8 (1991) ("From an antitrust standpoint, it is preferable to achieve efficiencies through joint ventures rather than by mergers."); *see also Copperweld*, 467 U.S. at 775 ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote."). Therefore, any such disparity in antitrust liability between a bona fide joint venture and a merged entity in terms of pricing their output should be eliminated. *See* Chang et al., *supra*, at 262 ("[A]ntitrust policy should not bias the selection of a form of business organization . . . . [Economic actors] should have the proper incentives to choose the most efficient organizational form."); *id.* at 265-266 (arguing regulators should strive to reduce the distortionary effect of "the antitrust tax on efficient economic behavior").

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[6] Indeed, the FTC's and the DOJ's Competitive Collaboration Guidelines expressly contemplate that a joint venture almost identical to those at issue here would be analyzed "under the Horizontal Merger Guidelines, rather than as a competitor collaboration [subject to § 1]." FTC & DOJ, Antitrust Guidelines for Collaboration Among Competitors § 1.3, Ex. 1 (analyzing a joint venture in which "[t]wo oil companies agree to integrate all of their refining and refined product marketing operations," but "maintain separate crude oil operations").

Treating a legitimate joint venture's pricing decisions regarding its own products as unilateral conduct would have other procompetitive benefits. It would have the salutary effect of foreclosing "difficult, intensive scrutiny of . . . intra-enterprise activities under extremely generalized rule of reason standards" and of preventing "claims, clearly inappropriate, . . . under per se rules or precedents dealing with arrangements between existing independent competitors." *Fraser* v. *Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002) (nonetheless declining to conclude that MLS was a single entity exempt from § 1 liability); *see* Werden, *supra*, at 705 n.18 (treating joint venture pricing decisions as unilateral action would permit "meritless . . . price-fixing claims, which could erroneously be decided under the per se rule, to be rejected as a matter of law").

2. Contrary to the Ninth Circuit's fears (Pet. App. 28a), holding that the pricing decisions of a fully integrated joint venture constitute unilateral conduct outside the scope of § 1 would not permit cartels to masquerade as fronts for price fixing. This Court has amply illustrated its ability to uncover sham joint ventures and to apply § 1 where the joint venture is not a bona fide economic integration.

For example, in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597 (1951), this Court rejected an attempt to avoid § 1 liability by disguising a naked market division scheme as a "joint venture." It properly concluded that the restriction at issue was in reality a cover for a per se unlawful agreement to divide territories and fix prices. *Id.* Similarly, in *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46, 48-50 (1990) (per curiam), this Court summarily rejected an attempt to disguise a naked market division agreement as a joint venture. And in *Maricopa County*, this Court found a medical foundation was "not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." 457 U.S. at 356. Accordingly, it had no trouble determining that the foundation's practice of setting maximum fee schedules for

doctors competing to provide medical services was naked price-fixing and per se illegal under § 1. *Id.* at 356-357.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT A JOINT VENTURE'S PRICING OF ITS OWN OUTPUT COULD BE A PER SE ILLEGAL "NAKED" RESTRAINT

Even if § 1 were applicable to a joint venture's pricing of its own output, this Court should still reverse the Ninth Circuit's judgment. In light of the undisputed evidence that Equilon and Motiva are legitimate joint ventures, designed to achieve substantial efficiencies by fully integrating the petitioners' downstream refining and marketing operations (Pet. App. 5a, 50a), this Court's statement in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), makes it clear that decisions as to how the joint ventures should price their output cannot be treated as per se unlawful price fixing. *Id.* at 9 ("When two partners [in a joint venture] set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act.")

Despite a passing nod to the principles enunciated in *BMI* (Pet. App. 15a), the panel ignored *BMI*'s clear application to this case and, in a deviation from traditional joint venture analysis, held that a joint venture's uniform pricing policy could constitute per se unlawful "naked" price fixing unless the policy was "reasonably necessary" to achieve the efficiencies promised by the joint venture. *Id.* at 21a. This holding rests on two fundamental misunderstandings of the proper scope of the per se doctrine under § 1.

First, the Ninth Circuit's holding fails to recognize that per se illegality for horizontal price fixing is limited to agreements "among competitors on the way in which they will compete with one another." *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984). Here, because Shell and Texaco have exited the downstream markets in which Equilon and Motiva operate, they no longer compete in those markets and any agreement between them as to the prices charged by

the ventures in those markets cannot constitute a per se illegal horizontal price fixing agreement.

Second, even if this case involved a horizontal agreement—which it does not—the Ninth Circuit's holding confuses the test for the ultimate legality of an alleged restraint with the threshold question of whether a restraint is "naked" for the purpose of determining whether it is per se unlawful or requires rule of reason review. Under this Court's prior decisions, a restraint is "naked" only if it "*facially* appears to be one that would always or almost always tend to restrict competition and decrease output," rather than "one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *BMI*, 441 U.S. at 19-20 (emphasis added) (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

Applying this standard, a restraint may not be condemned per se unless there are no "*plausible* arguments that [it was] intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (emphasis added); *see White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963) (naked restraint has "no purpose except stifling of competition"). If there is a plausible procompetitive explanation for an alleged restraint, then a court must instead evaluate the restraint under the rule of reason, with the plaintiff having the burden of proving both that the restraint will harm competition and that the restraint is not reasonably necessary to achieve the claimed procompetitive purposes. *See California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771-775 (1999); *Schering-Plough Corp.* v. *FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005), *pet'n for cert. filed*, ___ U.S.L.W. ___ (Aug. 29, 2005) (No. 05-273).[7]

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[7] Under the rule of reason, the plaintiff may be relieved of the burden of proving that the restraint is not reasonably necessary if the defendant is unable to substantiate its claims that the restraint serves a procompetitive purpose or if, on further scrutiny, it is apparent that the anticompetitive effects of the restraint outweigh its competitive benefits. *See*

Requiring joint venture owners to prove that their uniform pricing policy was "reasonably necessary to further the legitimate aims of the joint venture" to escape per se illegality, as the Ninth Circuit did here (Pet. App. 21a), puts the cart before the horse. If accepted, it would overturn nearly 30 years of well-established antitrust jurisprudence and would leave judges and juries free to second-guess the business decisions of joint venture partners, even where there is no conceivable harm to competition.

A. Per Se Illegality Is A Narrow Exception To The Rule Of Reason

Ever since *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911), the rule of reason has been the standard mode of analysis for evaluating the legality of an alleged restraint of trade under § 1 of the Sherman Act. *See State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997). Beginning in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court has carved out a narrow exception from the rule of reason for those agreements that are so plainly anticompetitive and so often lacking in any redeeming virtue that they should conclusively be presumed illegal without further examination. *See National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978). This narrow class of per se unlawful restraints includes naked horizontal price fixing agreements, which this Court has labeled one of the "paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA*, 468 U.S. at 107-108.

1. During the 1960s, this Court dramatically expanded the use of the per se label, applying it to concerted refusals to deal, vertical nonprice restraints, maximum resale price

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NCAA, 468 U.S. at 110. This type of truncated rule of reason analysis is sometimes referred to as a "quick look." *See California Dental*, 526 U.S. at 763. Here, the Ninth Circuit determined it was unnecessary to apply quick-look review because the respondents had established the per se illegality of the Equilon's pricing policy. Pet. App. 13a n.7.

maintenance, tying, and even certain joint venture agreements. This Court has since recognized, however, that this over-expansion of the per se doctrine resulted in "antitrust theories so abbreviated as to prevent proper analysis." *California Dental*, 526 U.S. at 794 (Breyer, J., dissenting).

2. Accordingly, in its decisions over the last 30 years, this Court has overruled or limited most of its decisions extending the per se doctrine beyond naked price fixing and market division agreements. These more recent opinions have cabined per se illegality as a limited exception to the rule of reason, one that can properly be applied only to a very narrow category of restraints that the Court has concluded, "after considerable experience," are "so plainly anticompetitive and so often lack any redeeming virtue that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases." *BMI*, 441 U.S. at 8-9 (quotation omitted); *see NCAA*, 468 U.S. at 103-104 ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); *Continental T.V., Inc.* v. *GTE Sylvania*, 433 U.S. 36, 49-50 (1977) ("Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."). For example:

- In *GTE Sylvania*, this Court overruled *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1968), and held that vertical nonprice restraints were not subject to per se condemnation. *See* 433 U.S. at 47-50;
- In *BMI*, in light of plausible procompetitive benefits this Court declined to apply the per se rule to a blanket license, which aggregated the licensing rights to multiple musical works into a single license sold at a single price. *See* 441 U.S. at 20-24;
- In *State Oil*, this Court overruled *Albrecht* and held that vertical maximum price fixing was no longer per se unlawful. *See* 522 U.S. at 7;

- In *Northwest Wholesale Stationers*, this Court declined to apply the per se rule to the membership rules of a wholesale purchasing cooperative, where those rules arguably advanced the procompetitive purposes of the cooperative. *See* 472 U.S. at 295-297;
- And in *Jefferson Parish*, this Court refused to apply the per se rule summarily to a tying arrangement, instead requiring proof of market power in the tying good to show per se illegality. *See* 466 U.S. at 13-16.

In those decisions this Court admonished federal courts to avoid "overly simplistic" and "overbroad" applications of the per se label. *BMI*, 441 U.S. at 9. Warning that "easy labels do not always supply ready answers," *id.* at 8, this Court has cautioned that not all agreements as to price constitute per se unlawful price fixing. The term price fixing, "[a]s generally used in the antitrust field, . . . is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable." *Id.* at 9; *see also Maricopa County*, 457 U.S. at 361-362 (Powell, J., dissenting) (price fixing label "is not to be applied as a talisman to every arrangement that involves a literal fixing of prices. Many lawful contracts, mergers, and partnerships fix prices. But our cases require a more discerning approach").

Rather than relying on formal labels, "[a] plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Northwest Wholesale Stationers*, 472 U.S. at 298; *see GTE Sylvania*, 433 U.S. at 58-59 ("[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect, rather than . . . upon formalistic line drawing."); *Law* v. *NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("[T]he *per se* rule is a 'demanding' standard that should be applied only in clear cut cases.") (quoting *GTE Sylvania*, 433 U.S. at 50).

3. These decisions have restored the rule of reason as the presumptive mode of analysis in § 1 cases. *See State Oil*, 522 U.S. at 10; *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*,

485 U.S. 717, 726 (1988) ("[T]here is a presumption in favor of a rule-of-reason standard.").

The rule of reason requires a court to examine the alleged restraint, taking into account all surrounding circumstances, including any likely anticompetitive effects and any claimed procompetitive justifications, to determine whether the net effect of a restraint is to harm consumer welfare through higher prices and reduced output. *See Standard Oil*, 221 U.S. at 58 (reasonableness of restraint depends on whether the restraint would "restrain[] the free flow of commerce and tend[] to bring about . . . the enhancement of prices" or would instead "develop[] trade"). As refined over the years, both by this Court and by other federal courts, the rule of reason requires a three-step analysis. *See generally FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-461 (1986); *Schering-Plough*, 402 F.3d at 1065; *United States* v. *Visa USA, Inc.*, 344 F.3d 229, 238 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004); *Law*, 134 F.3d at 1019. First, the plaintiff bears the initial burden of proving that the alleged agreement has caused, or is likely to cause, anticompetitive effects within the relevant market. If the plaintiff establishes the likelihood of such effects, then the burden shifts to the defendant to show that the challenged conduct advances a procompetitive purpose, sufficient to outweigh any anticompetitive effect. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

4. Notwithstanding the panel majority's mistaken belief that this Court follows a "two-tiered mode of analysis" (Pet. App. 12a), this Court's recent antitrust jurisprudence has emphasized that the per se and the rule of reason approaches are the end points of an analytical continuum that a court may apply in evaluating the legality of an alleged restraint of trade. *See California Dental*, 526 U.S. at 780-781 ("[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more

detailed treatment."); *NCAA*, 468 U.S. at 104 n.26 ("[T]here is often no bright line separating per se from Rule of Reason analysis."); *Polygram Holding, Inc.* v. *FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005) (this Court "has backed away from any reliance upon fixed categories and toward a continuum").

What ultimately is required is "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," in order to determine whether "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental*, 526 U.S. at 781.

5. The principal authority relied on by the panel majority (Pet. App. 17a-21a) for its erroneous approach is *Citizen Publishing*, which was decided at the height of what this Court has since recognized as an overly-exuberant expansion of the per se concept. *See* above, at pp. 16-19. Justice Douglas, writing for the Court, held that a joint venture combining the newspaper printing and distribution businesses of Tucson's only two newspapers was per se unlawful under § 1. *See* 394 U.S. at 135. Justice Douglas' application of the per se label to the joint venture was almost wholly gratuitous and not necessary to the Court's decision because the Court further treated the "venture as a merger . . . to an absolute monopoly of Tucson's daily newspapers." XIII Areeda & Hovenkamp, *supra*, ¶2121c, at 130. By contrast, the joint venturers here are just two of a large number of gasoline refiners and marketers, and their combination poses no threat of monopolizing the downstream gasoline market. The anticompetitive concerns driving the outcome in *Citizen Publishing* are, therefore, entirely absent in this case.

It is also difficult to square the invocation of the per se label in *Citizen Publishing* with this Court's decisions over the last 30 years. For the reasons developed below, this Court should clarify that to the extent *Citizen Publishing* stands for the proposition that an agreement between the owners of a joint venture as to the pricing of the venture's

output can constitute per se unlawful price fixing, *Citizen Publishing* has been overruled by *BMI*, *NCAA*, and *Maricopa County* and is no longer good law.[8] *Cf. Rothery*, 792 F.2d at 226 (observing with respect to similar joint venture decisions decided during the same period as *Citizen Publishing*, "to the extent [those cases] stand for the proposition that all horizontal restraints are illegal per se, they must be regarded as effectively overruled" by *BMI*, *NCAA*, and later decisions).

B. An Agreement Between The Owners Of A Fully-Integrated Joint Venture Regarding The Venture's Output Can Not Be A Per Se Unlawful Horizontal Price-Fixing Agreement Because It Is Not An Agreement Between Competing Sellers

The Ninth Circuit's first fundamental error in holding that joint venturers' decisions about the pricing of the venture's output could be per se unlawful was in treating the decision by the petitioners to adopt that policy as a horizontal agreement. The decisions of both this Court and the federal circuit courts of appeal clearly define horizontal price-fixing as an agreement among sellers of competing products on the price that they will charge for the competing products. *See BMI*, 441 U.S. at 8 (price-fixing consists of "agreements among *competitors* to fix prices on their individual goods or services") (emphasis added); *Augusta News Co.* v. *Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) ("The only price-fixing agreements that are condemned *per se*, with one narrow exception (minimum resale price-fixing) are agreements (1) between competitors (2) as to competing products or services (3) where, in addition, the agreement is not part of a larger, legitimate economic venture.").

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[8] It is worth noting that Justice Douglas' opinion engendered such concern that it led the Congress to overrule *Citizen Publishing* by enacting the Newspaper Preservation Act, 15 U.S.C. §§ 1801 *et seq.*, which grants newspaper joint operating agreements a limited exemption from the antitrust laws. *See Hawaii Newspaper Agency* v. *Bronster*, 103 F.3d 742, 744-745 (9th Cir. 1996).

More generally, this Court has defined a horizontal agreement as an "agreement among competitors on the way in which they will compete with one another." *NCAA*, 468 U.S. at 99. Here, there is no dispute that the uniform pricing policies at issue govern only sales by the joint ventures and never fixed the prices of any products Shell or Texaco sold individually outside the ventures. Indeed, since the joint venture agreements prohibit the petitioners from "continu[ing] to compete . . . in the relevant market," *SCFC*, 36 F.3d at 963, any agreement between Shell and Texaco as to the prices the venture will charge for its products cannot be an agreement regarding "competition with one another." *NCAA*, 468 U.S. at 99. Without that necessary horizontal element, the agreement cannot be a per se unlawful price-fixing agreement.

C. An Alleged Restraint Cannot Be Per Se Unlawful So Long As It Arguably Furthers The Legitimate Objectives Of A Bona Fide Joint Venture

The Ninth Circuit's second fundamental error was in holding that a pricing policy admittedly adopted in connection with a bona fide integration of economic activities is "naked," and hence unlawful per se, unless the petitioners can prove that the policy is "reasonably necessary" to achieve the legitimate purposes of the venture. Pet. App. 21a. This holding flies in the face of this Court's prior decisions, which require only that there be "plausible arguments" that an alleged restraint will advance the legitimate purposes of the venture and thereby "enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers*, 472 U.S. at 294; *accord BMI*, 441 U.S. at 19-20; *Polk Bros., Inc.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (if a restraint "arguably" promotes "enterprise and productivity," then "the court must . . . make a more discriminating assessment" than applying the per se rule).

1. This Court's decisions in *BMI*, *Northwest Wholesale Stationers*, *NCAA*, and *California Dental* illustrate the lim-

ited scope of the review courts are to undertake in determining whether an alleged restraint is "naked."

In *BMI*, this Court concluded that the blanket license offered by BMI "was not a 'naked restrain[t] of trade with no purpose except stifling of competition" because it facially facilitated "the integration of sales, monitoring, and enforcement against unauthorized copyright use." 441 U.S. at 20-21 (quoting *White Motor*, 372 U.S. at 263). This was enough, the Court held, to warrant rule of reason review.

Similarly, in *Northwest Wholesale Stationers*, this Court rejected an argument that a wholesale purchasing cooperative's expulsion of a member was per se unlawful because it determined that expulsion would not "characteristically be likely to result in predominantly anticompetitive effects." 472 U.S. at 296. The Court further recognized that, in contrast to *NCAA* and other cases, there were "plausible arguments" to support the procompetitive benefits of allowing a purchasing cooperative to expel members in order to achieve the economic benefits of such cooperatives. *Id.* at 294-296.

In *NCAA*, this Court declined to apply the per se rule to the NCAA's restrictions on its members' telecasts of college football games because "a certain degree of cooperation is necessary if the type of competition"—intercollegiate football—"is to be preserved." 468 U.S. at 117; *see id.* at 101 ("this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"). The Court reached this conclusion even though it found in its abbreviated rule-of-reason review that the particular restraint at issue was "not even arguably tailored to serve" the NCAA's interest in "maintenance of a competitive balance" among NCAA football teams. *Id.* at 119.

Finally, and most recently, in *California Dental* this Court vacated the FTC's use of quick-look review to invalidate a professional association's restriction on its members' advertising. *See* 526 U.S. at 771. Because information asymmetries in the market for dental services rendered "plausible" the procompetitive explanations offered by the

dental association for its advertising restrictions, this Court held that a more thorough rule of reason analysis was required to determine the legality of the restrictions. *See id.* at 771-773.

2. The Ninth Circuit paid lip service to these cases, but then deviated from them by holding that in order to be viewed as "ancillary" to a legitimate joint venture agreement and, therefore, not a per se illegal naked restraint, the restraint must be "reasonably necessary to further the legitimate aims of the venture." Pet. App. 21a. In the majority's view, the case turned on "whether the defendant's conduct—setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors—is reasonably necessary to further the legitimate aims of the joint venture." *Id.*; *see id.* at 22a & n.14.

By imposing so high a threshold to avoid per se liability, the court mistakenly conflated the standard for per se illegality with the test for determining the ultimate lawfulness of an ancillary restraint after a full rule-of-reason review. The ancillary restraints doctrine was imported from the common law into the antitrust lexicon by Judge (later Chief Justice) Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). Writing before either the per se doctrine or the rule of reason had yet been invented, Judge Taft addressed the legality of restraints "ancillary" to the formation of a partnership or other business collaboration. "Restrictions in the articles of partnership upon the business activity of the members with a view of securing their effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged." *Id.* at 280. Such restrictions are lawful so long as they are "necessary to protect . . . the enjoyment of the legitimate fruits of the contract, or to protect . . . from the dangers of an unjust use of those fruits by another party." *Id.* at 282. As initially used by Judge Taft, and subsequently in ensuing cases, the "reasonably necessary" test, *id.* at 281, therefore addresses the

ultimate legality of the restraint, not whether it is a "naked" restraint subject to per se condemnation.

3. As the United States correctly stated in its brief in support of the petitions for certiorari in this case (Br. at 13-16 & n.21), the *Addyston Pipe* ancillary restraint doctrine does not apply here because the joint ventures' pricing policies did not restrain the conduct of the partners to the joint venture, but only the venture itself. In misapplying that doctrine here, the Ninth Circuit also mistakenly used *Addyston Pipe*'s "reasonably necessary" standard to determine whether an alleged restraint is naked, and therefore per se illegal, rather than as the final step in applying the rule of reason to a restraint that has been shown to harm competition. That approach is completely contrary to this Court's decisions in *BMI*, *NCAA*, and *California Dental*. The conflict is evident from the dichotomy espoused by the Ninth Circuit in which "price fixing is 'naked' (in which case the restraint is illegal) or 'ancillary' (in which case it is not)." Pet. App. 16a. This formulation ignores the entire middle ground of restraints that are neither per se legal nor per se illegal, but that must be judged against the rule of reason to determine their likely net effect on competition.

D. Petitioners' Policy Of Charging The Same Prices For Their Two Brands Of Gasoline Was Not A "Naked" Restraint Of Trade

The dangers inherent in using a "reasonably necessary" standard to classify the pricing decisions of a fully-integrated joint venture as a naked restraint that is per se illegal are amply illustrated by the panel's decision here. In finding that petitioners had not shown that "unified pricing . . . further[s] the ventures' legitimate efforts to produce better products or capitalize on efficiencies" (Pet. App. 23a), the panel majority observed that its "analysis would be different" if the parties had combined their two product lines into one or eliminated the old product lines and invented an entirely new one. *Id.* at 28a; *see id.* at 15a. This Court's prior decisions (*see* above at pp. 22-24), do not permit a court to substitute its business judgment, in this manner, for that of

the parties as to how a joint venture should market its products and at what prices.

1. Given the valuable goodwill the two parent companies had developed in their two well-known brands, there were obviously good, procompetitive reasons for their two joint ventures to continue to market both brands, rather than try to introduce a single common brand. Among other things, marketing under both brands would provide a means to differentiate them, thereby appealing to a wider range of customers and competing more effectively against the brands of other gasoline manufacturers. *See* Carlton & Perloff, *Modern Industrial Organization* 326-332 (1990).

As the district court aptly noted, it makes no economic sense to require the joint ventures "to abandon or devalue long-standing investments in brand good-will to avoid per se" condemnation. Pet. App. 47a. Just as with the territorial restraints in *GTE Sylvania*, the existing Shell and Texaco brands were "valuable competitive tools," and it would be "unduly artificial" to deny the joint ventures the use of those brands in order to escape per se illegality. *See* 433 U.S. at 58 n.29.

2. Once a decision was made to continue to market both brands, how those brands were priced was purely a matter of business judgment, not a per se illegal naked restraint of trade. From its very earliest decisions under the Sherman Act to its most recent, this Court has consistently emphasized that courts should not base antitrust decisions on the reasonableness of the prices charged, lest they become price regulators. *See, e.g., Trinko*, 540 U.S. at 406 (courts are "ill-suited" to "act as central planners, identifying the proper price, quality, and other terms of dealing"); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396 (1927) ("We should hesitate to a adopt a construction making the difference between legal and illegal conduct . . . depend upon so uncertain a test as whether prices are reasonable."). Yet that is exactly what the court of appeals did here in holding that petitioners' uniform pricing policy could be found per se unlawful, without any empirical evidence of any harm to competi-

tion, simply because it did not see any need for the joint ventures to charge the same prices for both brands of gasoline. The threat of per se liability on so arbitrary a basis would "create precisely the kind of 'irrational dislocation in the market' that legal rules in this area should be designed to avoid." *Bus. Elecs.*, 485 U.S. at 729 n.3 (quoting *Monsanto*, 465 U.S. at 764).

The ability to price one's products free of government interference is essential to the efficient functioning of the "central nervous system of the economy." *Socony-Vacuum*, 310 U.S. at 226 n.59. This Court's decisions do not countenance a court second-guessing a joint venture's pricing policies without having even inquired as to "whether the effects actually are anticompetitive." *California Dental*, 526 U.S. at 775 n.12.

Here, there were plainly sound business reasons for petitioners to adopt a policy of charging the same price for both brands of gasoline where they were sold in the same geographic market. As petitioners argued below, that policy protected the ventures against the risk of expensive and burdensome litigation under § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a).[9] Charging the same prices for both

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[9] In rejecting this justification as "wholly without merit" (Pet. App. 26a), the Ninth Circuit did not even mention the leading decision of this Court, *FTC* v. *Borden Co.*, 383 U.S. 637, 640, 643-645 (1966), which holds that a single seller who charges different prices for different brands of a single product violates § 2(a) unless it can show that the differences in price were cost justified. The panel also failed to address *In re Standard Oil Co.*, 49 F.T.C. 923, 952 (1953), in which the FTC held that the chemical composition of gasoline is not the most "important competitive factor" in determining whether a products are of a like grade and quality under § 2(a).

In light of these precedents, there was a risk that, absent uniform pricing of the two branded gasolines, a customer could bring a non-frivolous price discrimination claim. Even if the petitioners might ultimately have prevailed on such a claim, it is entirely rational for joint venture partners to adopt a pricing policy that will minimize the costs and uncertainty of potential litigation under § 2(a), which could have nullified some of the cost savings the parties expected to realize from their ven-

brands of gasoline, on its face, also furthered the efficient operation of the two ventures by helping to assure that the joint ventures would not give preferential treatment to either brand. In any cooperative endeavor, the danger of such opportunistic behavior is a source of potential inefficiencies that can undermine the entire venture. *See* Williamson, *The Economic Institutions of Capitalism* 64-67 (1985). Mitigating the risk of such behavior has, for that reason, always been recognized as a legitimate business justification for an alleged restraint of trade. *See Addyston Pipe*, 85 F. at 280 (protecting "legitimate fruits" of contract from "unjust use by another party" may justify restraint).

3. For these reasons, the uniform pricing policy was, without question, "part of a larger endeavor whose success [it] promotes." *Polk Bros.*, 776 F.2d at 188-189. The decision to adopt that policy was made at the very outset of the venture and, on its face, served to mitigate risks that might otherwise have imperiled the venture's success. To the extent they were subject to § 1 at all, the petitioners' pricing policies should therefore have been evaluated under the rule of reason, not condemned as unlawful per se, even if the ancillary restraints doctrine applied. *Id.* at 189-190 (a restraint that "play[s] an important role in inducing" two partners to engage in "a cooperative venture that promises greater productivity and output" must be evaluated under the rule of reason).

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The Ninth Circuit's treatment of the pricing decisions of a fully integrated, procompetitive joint venture as a per se unlawful naked restraint is completely contrary to both this Court's precedents and economic common sense. Per se

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ture. *Cf. Schering-Plough*, 402 F.3d at 1075 ("There is no question that settlements provide a number of private and social benefits as opposed to the inveterate and costly effects of litigation."). Indeed, the "intensified guesswork involved with lengthy litigation cuts against the benefits proposed by a rule that forecloses" uniform pricing of multiple brands by a joint venture. *Id.*

analysis necessarily produces a certain number of "false positives." VII Areeda & Hovenkamp, *supra*, ¶1509c, at 403. The likelihood of such false positives resulting from the application of the per se doctrine to the pricing policies of bona fide joint ventures—a likelihood that came to fruition in the instant case—would undermine the incentive to create welfare-enhancing joint ventures that are increasingly important to the global economy and would thereby "'chill the very conduct the antitrust laws are designed to protect.'" *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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